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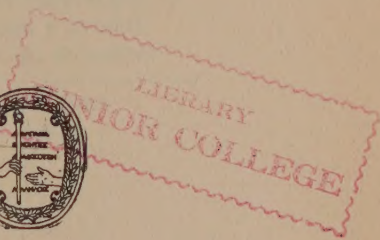


**ELEMENTS OF  
CONSTITUTIONAL LAW**



# ELEMENTS OF CONSTITUTIONAL LAW

BY  
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ELEMENTS OF  
CONSTITUTIONAL LAW

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FIRST EDITION

M-B



TO MY MOTHER



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## PREFACE

THE purpose of this volume is twofold. Its primary aim is to provide an elementary treatise on the law of the American Constitution which may be usable as a text in liberal arts courses in Constitutional Law. The case method which is so widely used in the Law Schools is being introduced also into the Liberal Arts courses in Constitutional Law. The author commends the use of cases in such courses. In fact his experience of several semesters teaching the elements of Constitutional Law to undergraduates convinces him that the study of cases in this field is highly desirable. He is, however, as firmly convinced also that the study of cases alone does not bring the best results and that the student will profit much more if the cases are read in connection with a sketch of the elementary principles of the field. It is hoped that the material in these pages may serve as an outline of the elementary principles. Furthermore, it is hoped that the material may also be considered worthy of use in connection with other courses in Government.

While this volume is primarily intended for use in connection with college courses it has nevertheless been prepared in the hope that the general reader, interested in delving a little deeper into constitutional problems than does the average description of our governmental machine, will find this elementary treatise of value. The aim of the author has been to discuss the judicial interpretation of the Constitution in such a simple fashion that no knowledge of legal technicalities is necessary to the understanding of the material offered.

Under a popular government it is obviously desirable that the general public should be informed concerning the basic features of our governmental system. It is

unfortunate that even the most elementary principles of Constitutional Law are too often looked upon by the average intelligent American as being matters in which lawyers only should be interested. Why should not a thorough knowledge of the Constitution and of the judicial interpretations which have been made of it possess as much cultural value as familiarity with great passages of literature or a sense of appreciation of good music? Furthermore, such a knowledge has a direct and specific bearing on good citizenship.

The author is especially grateful to his wife, Elsie Baade Arneson, whose counsel and criticisms have been invaluable. Professor Howard White of Miami University, for several years a colleague of the author, has made many helpful suggestions in connection with certain parts of the work. To his students the author is also under obligations. Especially is the assistance given by Mr. Charles W. Shull and Mr. Robert L. Quinn appreciated. For the errors which may appear the author is, however, alone responsible.

Delaware, Ohio

*October 25, 1927*



ELEMENTS OF  
CONSTITUTIONAL LAW



## WHAT IS CONSTITUTIONAL LAW?

THE average American should know the fundamental facts about the Constitution and should have a general knowledge of the interpretations which have been made by the courts of the written Constitution and the laws made pursuant to it. The extent to which such knowledge is generally diffused among intelligent Americans should mark also the extent to which sentimentalism on the one hand and unmerited adverse criticism on the other will be lessened. The Constitution to-day is suffering because of the worship which it receives from overzealous admirers. It also suffers from unwarranted attacks by poorly informed critics. What is needed is a careful study of the Constitution and of constitutional law, which study, no doubt, will make the worshippers less worshipful, but which at the same time may in other quarters develop an interest in and a respect for our constitutional system instead of scoffs and sneers. The unbiased student of our Constitution is likely to be convinced that it has many defects and that it is far from being an inspired instrument, but that at the same time its many merits are indisputable. Furthermore, the Constitution exists as an authoritative document. If it has merits they should be known and appreciated. If it has shortcomings these should be faced squarely so that proper and constitutional means may be taken to remedy them.

Two words need explanation at the very outset. These words are *law* and *constitution*. A clear understanding

of the use of these terms will give us a clearer notion of the subject to be covered. If we know with some precision what the word *law* means and what the word *constitution* signifies, we shall obviously recognize the import of the phrase *constitutional law*.

WHAT IS LAW?—A law is a rule of conduct which the government compels us to obey. It may be a rule compelling us to do certain things, such as the purchase of a license tag for an automobile, or it may be a rule forbidding certain things, such as the counterfeiting of money. But, whether a law is a command or a prohibition, it has the government back of it and anyone who refuses to obey is liable to punishment. The backing which a rule of conduct gets from the government is sometimes called the sanction. Thus sanction, which carries with it punishment usually in the form of fine or imprisonment and in extreme cases the death penalty, is the chief distinction between law as we are using it in this discussion and other rules of conduct not enforced by the state. For example, there may be rules of conduct laid down by the Church, such as the command against covetousness, but unless these rules are punishable by the government we do not call them laws in the strict sense of the word. Again, there are many rules of conduct laid down by polite society, as, for example, the use of eating utensils at the table, which are not sanctioned by the government and are not laws in the sense in which we are here using the word. Such rules of conduct, then, as are prescribed and enforced by government officials, and only such rules, are properly called law.

WRITTEN LAW.—Law comes from two sources. One of the sources is the legislature, or some other organized group of men who formally draft in exact words the statements which are to be a part of the law. When a law

comes into being in this way, it is called written law. Most of our written laws are called "statutes," which is the term used to indicate laws passed by a legislature. Everyone is familiar with this type of law. Copies of the statutes of Congress—our national legislature—and of the statutes of our state legislatures are easily accessible. Frequently the statutes relating to any one subject, such as school laws, game laws, election laws, and so forth, are collected and published in convenient form. Copies of certain statutes are often posted in conspicuous places for the information of the public.

There is, however, one type of written law which is never referred to as a "statute," and that is the written constitution. More will be said about this later.

**UNWRITTEN LAW.**—Much of our law, however, is not drafted into formal codes. If we are to understand the law of contracts, for example, it is necessary to study, not only the statutes relating to contracts, but the unwritten sources as well. The most prolific source of unwritten law is the court decision. The student of law spends most of his time in analyzing and comparing the decisions of the courts as they interpret the law and apply it to specific cases. To read all of the statutes dealing with contracts would not take long, but to understand, even to a moderate degree, the law of contracts requires also the long and patient perusal of a long, long list of court decisions dealing with this subject. Court decisions have added importance in American and in English jurisprudence because of the rule that courts must follow the precedents of earlier decisions unless later overruled by a higher court or modified by an enactment of written law.

Another source of unwritten law, but by no means as important as court decisions, is custom. If a certain

custom has been followed for time immemorial it is usually recognized as a source of law provided it is not in conflict with other sources of law. Let us assume, for example, that no mention is made in the traffic laws of the practice which compels a driver to turn to the right in meeting vehicles. If a law is passed penalizing motorists for careless driving, a person turning to the left might be penalized even though the law is silent on this point, as the established custom of turning to the right would be looked upon by the courts as a proper source of the law.

The two most fruitful sources of the law, however, are (1) the statutes, furnishing written law, and (2) the court decisions, furnishing unwritten law. In case of conflict between written and unwritten law, the written law holds. Hence, while it is true to say that the student of our legal system must give much more time and attention to the unwritten than to the written sources, it must also be remembered that a written enactment may at any time overturn a long series of judicial decisions.

CONSTITUTION.—In the broadest sense, the constitution of a country is made up of that part of the law which deals with the essentials of the governmental system. That is, if we sift out from the laws all the fundamental provisions regarding the framework of government and the relation of the people to the government, we have the constitution. The constitution is made up of the essentials, or the fundamentals, stripped of all detail and all matters of secondary importance. It is in this sense that we speak of the English constitution. Every political unit has a constitution in this sense, with parts which may be written and others which are unwritten. We may properly speak of the United States having a constitution in this broad sense.



**THE WRITTEN CONSTITUTION.**—In our country, however, as in many others, the term constitution is used in two different senses. In addition to the one just described the word is applied, and properly, to the written constitution. When we speak of the constitution, we are likely to think not of the broad constitution, but of the written document made up of a few printed pages and consisting of the original constitution drafted in 1787, plus the nineteen amendments which have been added since that time. This is the sense in which the word is used by the average American. When the average intelligent person on the street speaks of the "Constitution" the chances are that he refers to the written document. The trained student too constantly uses the term in this sense. There is no objection to this use, rather it is highly desirable. In fact we shall use the term in this sense most of the time in this discussion. Nevertheless, the careful student of the subject must realize that the constitution in the broader sense also exists.

**THE CONSTITUTION IN THE BROAD SENSE.**—As already indicated, the constitution in the broad sense is made up of all those fundamental rules and principles, written or unwritten, which outline the essential features of a governmental system. Again let us emphasize the words "fundamental" and "essential," for it is with matters of this nature that the constitution properly deals.

There are five parts which go to make up the broad constitution, each one dealing with essential features. In the first place, there is the written constitution which is an important part of the broad constitution. Indeed, it might be well termed the most important of all, as it is the supreme law of the land. All other parts of

the broad constitution—all laws, no matter what may be the source, must conform to the written constitution. Secondly, there are the fundamental statutes passed by Congress which provide for many features of our government, not mentioned in the written document. A careful study of the written constitution would not give us a complete picture of the essentials of the governmental machine. For example, none of the departments of government are established by the written constitution: all are the result of legislation. In the third place, as a part of our broad constitution, we find treaties or international agreements in so far as these relate to essential features of our government. Most treaties would hardly be called a part of our constitution but there are a few types—such as those relating to the World Court, for example, which might properly be classed as affecting our fundamental governmental system.

Then, in the fourth place, we have a very important part of the broad constitution, namely, court decisions involving fundamental questions. Explaining and interpreting the written constitution, are volumes and volumes of decisions of courts. No one can really understand the written constitution and the laws and treaties passed pursuant to it, unless he knows what the courts have said in interpreting these documents. The exact meaning of a phrase in the constitution depends ultimately upon the interpretation of the courts. This will be discussed more fully in Chapter II and again in Chapter III.

In the fifth and last place, we have one other item which must be included in the broad constitution. A knowledge of the written constitution, an understanding of the fundamental statutes and treaties, familiarity with leading court decisions on constitutional questions,

—all of these together would not give us a complete picture of the fundamentals of our political system. A foreigner coming to our shores might study our written constitution, statutes, treaties and court decisions and still be at a loss to explain how we proceed in the election of a president. This is because certain political *customs* have developed which determine parts of the electoral procedure. By *custom* the presidential electors vote for the man whom their respective political parties have previously nominated in the party convention and no written laws nor court decisions throw any light on this procedure nor do they make any provision for it. In many other instances custom fixes certain rules which are almost as inexorable as any written laws. The custom of refusing a third term to a president is a noteworthy illustration of a custom so important that it is entitled to a place among the rules and principles which make up the broad constitution.

The five items then, (1) the written constitution, (2) fundamental statutes, (3) fundamental treaties, (4) fundamental court decisions, and (5) important political customs, taken together make up our constitution in the broad sense. The word "fundamental" is conspicuous in this outline, and properly so, for reasons already given.

Of these five items, *two* will receive special attention in this volume, the *written constitution* and the *court decisions interpreting it*. To be sure, we shall refer frequently to the statutes but practically all such references will be occasioned by the violation, alleged or real, by these statutes of the written constitution. It shall be our aim to explain the exact meaning of the written constitution and to do this properly, we must constantly call the courts to our aid. As we shall refer to the .

written constitution much more frequently than to the broad constitution, we shall in the following chapters use the term *constitution* to mean the written document. When we have occasion to refer to the constitution in the broad sense, we shall so indicate by express terminology.

**PUBLIC LAW AND PRIVATE LAW.**—On a basis entirely different from anything we have been discussing, law might be divided into public and private law. Public law is that which deals with the relations between the individual and the state. The most important divisions of public law are (1) constitutional law, dealing with fundamental governmental structure and functions: (2) administrative law, which outlines the duties of public officials and provides remedies which the private citizen may use in case his rights are interfered with by the government: and (3) criminal law, which provides for the punishment of those who are guilty of acts of a culpable nature which infringe upon the rights of the state or of other individuals. Sharp lines cannot and need not be drawn between these three classes and at times constitutional law occupies itself with matters of an administrative or of a criminal nature. This is not only unavoidable but desirable whenever a fundamental governmental agency is involved.

Private law is made up of those rules of conduct sanctioned by the state which deal with the relations of individuals to one another. Property, contracts, torts, and domestic relations are some of the divisions of private law. Occasionally constitutional law occupies itself with questions which on the surface appear to be matters wholly in private law, but whenever the conduct of an individual toward another is such that a constitutional right is interfered with, it properly involves the interpretation and application of the rules of consti-

tutional law. Very seldom, however, is constitutional law involved in connection with relations of individuals to another except when this relationship is the result of a statute which is alleged to be unconstitutional. We shall hear more about this in later chapters.

## CHAPTER II

### CONSTITUTIONAL CHANGES

THE only way in which the Constitution may be changed is by the means prescribed by the Constitution itself. If no amending process is provided, it may be necessary to go through a bloodless revolution to insert an amending process, or perhaps to call together a constitutional convention of the same type which originally framed the document. Fortunately, however, these questions, which some of the states of our country have been compelled to face, do not arise in connection with the Constitution of the United States. The framers of our federal Constitution, realizing that no document can be perfect, very wisely inserted detailed provisions for its amendment. There are two steps in the amending process,—(1) the proposal of the amendment, and (2) the ratification.

HOW AMENDMENTS ARE PROPOSED.—The Constitution provides for two methods of proposal. The first of these, which is the only one used so far in our history, is by a two-thirds vote of both houses of Congress. The question has been raised as to whether this means a two-thirds vote of all members of each house or only a two-thirds vote of those present. The opponents of the prohibition amendment contended before the Supreme Court that the amendment was invalid because in the vote in the House of Representatives it had received the support of less than two-thirds of the entire membership, although more than two-thirds of those present had voted in its favor. The court held that the consti-



tutional provision means a two-thirds vote of those present—assuming the presence of a quorum.

The Eleventh Amendment was attacked on the grounds that the President had not signed the resolution proposing it, but the court decided that the signature of the President was not required to make such a resolution valid.

A second method of proposing amendments is also provided by the Constitution. At the request of the legislatures of two-thirds of the states, Congress must call a constitutional convention which may propose amendments. Because of the additional machinery which this method entails it is not likely that it will be called into use. All amendments to the Constitution have been proposed by the first method.

HOW AMENDMENTS ARE RATIFIED.—After an amendment is proposed, it is sent to the several states for ratification. The Constitution mentions two methods either of which may be used, except that all states must use the same method. In proposing an amendment, Congress must indicate which of the two modes of ratification is to be followed for that particular proposal. In every case so far, Congress has chosen the first method, which is the approval by the legislatures of three-fourths of the states. The second method is the approval by conventions in three-fourths of the states. As in the case of proposals, the more cumbersome machinery has never been used. Up to the present, at least, the amending process—as to both proposal and ratification—has used only the machinery at hand—namely, Congress for the proposal, and the state legislatures for ratification. The consent of the governor to the ratifying resolution of the state legislature is not necessary.

A number of interesting questions have been raised in connection with the ratification of amendments. May

Congress, having submitted an amendment to the states, later withdraw it? This question has never been brought before the courts, as in no instance to date has Congress made any move in the direction of withdrawing a proposal after its submission. The chances are that the court would hold that a proposal once sent to the states after a two-thirds vote of both houses could not be withdrawn. This question, however, does not have the practical importance which is involved in the question as to whether a state which has ratified an amendment may withdraw its ratification. In a number of instances in the past a state legislature has ratified an amendment and later has tried to withdraw the ratification. In 1867 Ohio ratified the Fourteenth Amendment, but a year later and before a sufficient number of states had ratified, withdrew her consent. New Jersey shortly after also withdrew the consent which she had given eighteen months before. Nevertheless, the Secretary of State counted both these states among those ratifying and promulgated the amendment. This question has never come before the courts, but Congress has declared that no state may withdraw its ratification. It seems to be settled definitely that when a state ratifies an amendment it is final. To allow a state to withdraw its consent would obviously lead to unnecessary complications and great confusion.

How long a period of time may elapse between the submission of a proposal by Congress and its ratification by a sufficient number of states? The Constitution makes no statement on this point, and many constitutional lawyers have realized the possibility of the revival at any time of a rejected amendment—of which there are at present four in addition to the recently proposed child-labor amendment. As recently as 1921, however, the Supreme Court in a case involving the

Eighteenth Amendment indicates that in its opinion an amendment must be ratified within a reasonable period of time. This statement, to be sure, is not definite, but it does put an end to the speculation as to the probability of the political immortality of a rejected amendment.

Probably the most interesting question which has been raised in this connection, and the only one which has been clearly answered by the courts, is one involving the meaning of the word "legislature" as used in the amending provision of the Constitution. Does the word refer only to the representative legislative body which meets at the state capital, or might it be interpreted to include also the electorate acting in a legislative capacity through the initiative and referendum? In several states the legislative power is exercised in part by the people through direct legislation, as well as by the legislature proper, and it might fairly be asked if the word "legislature" might not be used in this broader sense. If a state should decide to have a legislature of a thousand members instead of one of a hundred, no doubt this would clearly come within the accepted use of the term. Why might it not also include tens or hundreds of thousands of members exercising legislative power only occasionally? These questions were squarely answered by the Supreme Court in a case arising out of a situation in Ohio where the legislative power is in part exercised by the people through the initiative and referendum. The state constitution of Ohio, through an amendment added in 1918, reserves to the people of the state the legislative power of a referendum on the action of the state legislature ratifying a proposed amendment to the Constitution of the United States. When the legislature of the state, early in 1919, ratified the Eighteenth Amendment, a referendum was asked for by

the opponents of prohibition. The question as to whether this was in violation of the Constitution of the United States was brought before the Supreme Court, which held that the term legislature applies only to the legislative body as distinct from the electorate, and that, therefore, any attempt to make the ratification of a national amendment by a state legislature depend upon a favorable vote in a referendum is null and void.<sup>1</sup>

LIMITATIONS ON THE AMENDING PROCESS.—The Constitution contains two express limitations on the power to amend it. One of these, prohibiting interference with slave trade before 1808, is, of course, no longer of legal consequence. The other specifically prohibits any amendment which would deprive any state, without its consent, of its equal suffrage in the Senate. If, for example, because of the small population of Nevada, every other state in the union should favor an amendment allowing her only one Senator as against two from other states, such a change would be impossible. One state at this point can stand successfully against the other forty-seven. The insertion of this guaranty was, of course, a result of the fear existing among the smaller states that they might be overwhelmed by the larger ones.

ARE THERE IMPLIED LIMITATIONS ON THE POWER TO AMEND?—This question was not seriously raised until the adoption of the Eighteenth Amendment. At that time the opponents of prohibition appeared before the Supreme Court and argued that there are certain implied limitations on the amending power. They contended that the power to amend was limited to changing the subject matter already in the Constitution and that the addition of new material was entirely outside of the scope of the amending power. They objected, further,

<sup>1</sup> *Hawke v. Smith*, 253 U. S. 231.

to the amendment on the ground that it was legislation—that it prescribed a rule of conduct for individuals—and they insisted that the Constitution should deal with the framework of government rather than lay down laws governing personal conduct. To be sure, the amendment did, for the first time in our history, touch directly the lives of private individuals, by prohibiting certain acts. Previously all constitutional prohibitions had been directed toward governmental agencies and public officials such as prohibiting the coining of money by the state and prohibiting the acceptance of foreign titles of nobility by officials of the United States. It is indeed quite a different matter to prescribe certain rules for public officials than to enter the domain of private conduct. Nevertheless, the novelty of such a provision is no argument against its validity, as the opponents of prohibition discovered when the court refused to uphold either of the above contentions.

Neither did the court give any weight to a third line of argument offered against this amendment—an argument which touches the fundamental theory of American government much more closely than do the others. This argument was as follows: The prohibition amendment destroys the very nature of our government, which is one based on an indestructible union made up of indestructible states. If the power of regulating personal conduct in connection with the manufacture, sale, and transportation of intoxicating liquor can be transferred from the states, which under our theory of government possess the inherent and residual power of regulating all human conduct, there is no reason why other fields of conduct might not, by further amendments, be placed under federal control. This might mean practically an annihilation of the several states as sovereign political



units which annihilation is clearly in violation of the spirit of the Constitution.

As already stated, this argument did not convince the Supreme Court, which held in 1920, in the famous National Prohibition Cases,<sup>1</sup> that the matter of prohibition is properly the subject of a constitutional amendment. As the matter now stands, there seems to be no limitation of any sort upon the power to amend the Constitution except that no state may be deprived, without its consent, of its equal suffrage in the Senate. With this exception, it is within the power of two-thirds of both houses and the legislatures of three-fourths of the states to make such alterations and improvements and to add such new material to the Constitution as they see fit. Of course, it is not likely that such a large majority of Congress and a still larger majority of the state legislatures will make any radical changes, and this leads us naturally to an inquiry as to whether the amending process is as responsive to changing political conditions as it should be.

IS IT EASY TO AMEND THE CONSTITUTION?—The American Constitution is old according to modern standards. In fact, no country in the world is operating under a written constitution as old as ours. The various constitutions of Europe, South America, Asia, Africa, and Australia, as well as those of Mexico and Canada, have all been formulated long years after 1789—many of them within the last fifty years. In comparison with the ages of the constitutions of other national governments the 138 years since George Washington became President is indeed an extensive period. The advances in science

<sup>1</sup> 253 U. S. 350.

<sup>2</sup> This section and the succeeding one are reprinted by permission of the publishers of the *American Law Review* from articles by the author appearing in that journal in the issues of July-August 1926 and January-February 1927.

and invention and the consequent changes in modes of living have been so remarkable that it would, no doubt, be true to say that the American Constitution has operated over a period of more vital and varied changes than has any other fundamental law in the history of the world.

In these 138 years of unparalleled development in every field of human endeavor, what has happened to the Constitution? Nineteen amendments have been added, but of these the first ten were to all intents and purposes a part of the original Constitution. When the constitutional convention of 1787 finished its work and the new Constitution was presented to the several states, it was criticized because it contained no bill of rights. Some of the states in accepting the Constitution did so—to use a more modern phraseology—“with reservations,”—the reservations being that a list of constitutional guaranties should be added; and as a result the new government had barely gotten under way before the first ten amendments were appended. It would not be unfair to insist that these ten amendments are the result of the same constitutional movement as the Constitution itself. This would mean that they might properly be looked upon as a part of the original Constitution and should not be listed among the amendments. If, however, they are to be so listed it is obviously unfair to count them as ten separate and distinct changes. If they are to be listed as amendments at all, they may properly be considered as one amendment with ten subdivisions, all dealing with restrictions upon the federal government.

Outside of these early changes, the Constitution has been amended only nine times, the Eleventh Amendment (which properly might be called the Second Amendment) coming in 1798, the Twelfth in 1804, and the

last, or the Nineteenth (properly the Tenth), being proclaimed August 26, 1920.

How easily have these changes been brought about? Have these changes been quietly and unostentatiously wrought, or did they come as the accompaniments of great crises or as the results of long periods of agitation?

The Eleventh and Twelfth Amendments came more easily, perhaps, than any of those which followed, but even in the case of each one of these a crisis had developed which made a change imperative. The Eleventh Amendment was precipitated by the fact that Georgia refused to be sued in the federal courts by a citizen of New York, insisting that a sovereign state could be sued only in its own courts. The original Constitution clearly gave the federal courts jurisdiction over cases of this sort, but in order to placate Georgia and to stave off threatened secession the Constitution was changed so as to take out of the jurisdiction of the federal courts cases prosecuted against a state by citizens of another state.

The Twelfth Amendment was an endeavor to strengthen the provisions for electing the President and Vice-President of the United States. Originally, the candidate receiving the highest vote in the electoral college was to be President and the second highest Vice-President. As a result of the elections of 1800 under this ridiculous system, Aaron Burr, who was the choice of the Anti-Federalists for Vice-President, came within one vote of being elected President. The Twelfth Amendment provided for a separate ballot for President and for Vice-President. Many students of government feel that the change should have been more far reaching and that the entire electoral college should have been abolished.

After this change, which came in 1804, no further



additions or revisions were written into the Constitution until 1865, when the Thirteenth Amendment abolishing slavery was adopted. This was followed the next year by the Fourteenth Amendment, which made the negro a citizen and guaranteed to all citizens certain rights. The Fifteenth Amendment, giving the negro the vote, came in 1870. That three amendments of such importance should come in the brief space of five years is sometimes used as an argument to prove the facility with which changes are introduced into the fundamental law. But the fallacy of such a contention is obvious. These three amendments were placed in the Constitution at a tremendous cost and as a result of a most unusual emergency. It took one of the bloodiest civil wars of all history to develop a situation which made these changes possible, and to argue that these amendments came except with great difficulty is manifestly unfair.

Since the Civil War period there have been but four additions to our fundamental law. Two of these—the income-tax amendment and that providing for the popular election of Senators—came in 1913; the third—the prohibition amendment, was adopted in 1919, although by its own provisions it did not go into operation until a year later; and the fourth, relating to woman suffrage, came in 1920. Thus, the year 1913 witnessed the advent of two amendments within three months of one another, and, naturally, those who felt that our Constitution is flexible enough as it now stands looked upon these seemingly rapid changes as a vindication of their viewpoint. To the casual observer an amendment in February and another in May would indicate considerable flexibility. A careful study of the situation reveals, however, that neither of these amendments came except as the result of a long and slow process.

In 1895 the Supreme Court held that the income tax

was a direct tax and, therefore, unconstitutional unless apportioned among the several states according to population. This decision meant that no equitable income tax could be levied by the federal government without a constitutional amendment. The country was willing to have an income tax, Congress had provided for it by law, and economists generally favored such a tax. But in spite of this situation, eighteen long years elapsed before the movement for an amendment culminated. If one is to argue on the basis of the income-tax amendment, about all that can be said is that if the country needs a reform badly it will get it in eighteen years. This is not saying that it takes eighteen years to amend the Constitution. It could, conceivably, be done in a few weeks with the coöperation of the President, Congress, and the governors and legislatures of the several states, but *it never has been amended speedily*, and if you take the income-tax amendment as evidence of the speed of the amending process, it merely indicates that eighteen years of insistent demand is necessary for a constitutional change.

In the case of the amendment for the popular election of Senators it is also evident that an agitation of many years' duration had been fostering this movement. Before 1913 many states had developed extra-legal methods of providing for the popular election of Senators, and the amendment came decades after the general conviction on the part of the public that the members of the upper house should be popularly elected.

What about the last two amendments? Does the procedure relative to their respective enactments give ground for the belief that constitutional changes are easily made? In 1920, as seven years previous, those who contended that our fundamental law is flexible enough pointed with great satisfaction to two amend-

ments—both becoming operative within the same year. But here again investigation shows that these changes came only after overcoming tremendous obstacles.

The prohibition amendment was the result of two very different and unrelated factors. In the first place, the war so unsettled things generally that changes could more easily be made, and many believe if it had not been for the war the amendment would not have been so readily adopted. More closely related to the movement, however, were the educational and propagandist activities which accompanied it. By 1920 the great majority of adult Americans had been taught in the public schools, and very properly, that alcohol is a bad thing for the human body. The prohibition amendment perhaps indicates that, if you want to change the Constitution, it may be desirable to educate a whole generation and, to make the amendment more certain of passage, to put on the final drive for its adoption during a period which lacks normalcy. This can hardly be said to be a facile amending process.

Likewise, the woman-suffrage amendment came only after a long period of education and propaganda. Years before national suffrage was granted, state after state had given women the vote, wholly or in part. Many of the European countries had already given women this privilege. Even Russia and Germany, in their new constitutions, had abolished all sex discriminations in suffrage. Even conservative England in 1918 had given women—only those over thirty, to be sure,—the right to vote.

The so-called Susan B. Anthony amendment was introduced into Congress in 1878. Forty-two years afterward it became a part of the Constitution. If a person of twenty-one should begin agitating for some worthy cause and should have the same experience in getting

constitutional recognition, he would be in his sixty-third year when his efforts would be successful. How any discriminating person can contend that the adoption of the most recent two amendments is evidence of flexibility in our fundamental law is hard to understand.

A perusal of the *Congressional Record* shows that several thousands of proposed amendments have failed to receive the two-thirds vote necessary for their submission to the states for ratification. Most of these proposals deserved their fate. But among these thousands several could be sifted out which would be worthy of the support of careful students of the American political system.

To conclude that our Constitution is difficult to amend seems unavoidable. This, of course, does not necessarily condemn the amending process. But this much should be clear: to those who believe in a slow and difficult amending process as a necessary guaranty of stability the present procedure should be very acceptable, and from such persons the *status quo* should receive hearty support. But from those who believe that a difficult amending process is an unnecessary obstacle in the way of legitimate progress constructive criticisms are entirely in order.

A MORE FLEXIBLE CONSTITUTION.—What would be the reaction of an Englishman if he should discover that his Parliament was powerless to remedy a situation which would compel a manufacturer in Birmingham to observe a much higher standard of sanitation in his factory than would a competing manufacturer in Manchester? What would he say if, on noting that industries in Liverpool were permitted to employ child labor while competing industries in London were forbidden to do so, he should discover that there was no way in which the Parliament might make the rules for the employment of child labor

uniform throughout the United Kingdom? Suppose that a Frenchman should discover that his Parliament was powerless to remedy any confusion which might exist due to the lack of uniformity in the marriage and divorce laws in the several departments of France. Or suppose that a German should find that his national government had no authority to regulate insurance companies with nation-wide clienteles. The surprise which would result from the discovery of any such situation in these or other countries—which situations do not and could not exist—explains why, to the foreign observer, it is inexplicable that the national government of the United States is practically powerless in so many fields.

Uniformity of industrial and labor regulation, of marriage and divorce laws, and regulation in other fields is not only highly desirable, but necessary in our modern and complex social and economic life. There are, of course, various reasons why our central government is helpless in many situations, but one of the most important is the fact that our Constitution is so difficult to amend that needed changes are well-nigh impossible of achievement. Witness, for example, the fate of the child-labor amendment.

But, it is argued, if you make it easier to change the Constitution we may find policies written into the fundamental document which are not permanent in their nature. It should be remembered, however, that the chief objection to an inclusion in the written Constitution of policies which may not prove of permanent value is based on the assumption that a provision once in the Constitution is there for all time. If, however, an easier and a less complicated amending process would provide the entry, into our fundamental law, of any change, it is also clear that such an easier process would make it possible to rid the Constitution of such an addi-



tion if changing conditions would make it desirable to do so.

Under the present amending process, a great wave of public opinion is necessary to make a change. If the change is an unwise one it is then necessary to wait for an equally powerful movement to make a later and wiser counteracting change. It is as though one would weld an accessory to an automobile so that it would be difficult to replace it later with more modern substitutes, instead of bolting it on so that the later change might be made without unnecessary trouble and delay. For example, the Fifteenth Amendment, guaranteeing suffrage to the negro as a race entirely without regard to the fitness of individuals in the race for the vote, was placed in the Constitution as a result of the tense feeling of the Reconstruction period. This amendment, which in many states has worked against negro suffrage rather than in its favor, would have accomplished more if it had provided for the gradual and proper fitting of the negroes for voting and had prohibited discriminations against negroes possessing certain minimum qualifications. But now the amendment stands, although in many respects it is a dead letter. To replace it with a more sensible provision which might, in fact, give the negro a more favorable position politically is impossible, because there is no great tide of sentiment comparable to the one which swept the amendment into the Constitution during the post-war period.

Is it desirable that only an unusual demand should be effectively registered in a fundamental law, which demand can be counteracted only by an equally unusual demand for a contrary change? Such circumstances are likely to lead to a marked swinging of the pendulum of public opinion as only a marked swinging is registered. Would it not be better to make gradual and

less marked changes possible? A written constitution may properly be less vulnerable than the statutes, but the present rigidity which makes slow and gradual change difficult often encourages disrespect for the Constitution. While no student of government is likely to counsel an extreme sensitivity in the written constitution to passing popular whims, it should not, on the other hand, be necessary to wait for an unusual demand for an amendment.

In addition to the fundamental changes as to centralization of power there are minor changes in the Constitution which are generally considered desirable. March 4 is an awkward date for the beginning of the governmental year. This is not an important matter, but the advantage of a changed date of inauguration, comparatively slight though it may be, can be gained only by putting into operation the cumbersome and slow-moving amending process. There are many other details which might be changed to advantage, but which scarcely warrant the trouble of using a heavy and laborious process. If a property-owner finds a good-sized pebble on his front walk, he is likely to remove it without delay. But if in order to remove the pebble it is necessary to get a hundred-horse-power steam shovel to do the work, he is likely to suffer the comparatively small obstruction to remain. In the same way many inconveniences in our fundamental law are suffered to remain because of the burdensome and onerous task which the consummation of their removal involves.

From the above arguments it does not necessarily follow that the Constitution should be too easily amended, but it does seem that some steps might be taken to make the process more facile than the existing one. What the happy medium should be is a problem to which

statesmen and other students of governmental problems might well give attention.

DANGERS OF A TOO FACILE AMENDING PROCESS.—Any argument in favor of a less rigid amending process is easily misunderstood. It is readily misinterpreted to be a plea for the abolition of all distinction between the Constitution and the statutes, so that Congress might amend the Constitution as readily as it now changes or repeals a statute. This is far from the purpose of the above statements. If it is desirable to avoid the dangers of rigidity, it is equally desirable to avoid excessive flexibility. We are still, in spite of the age of our Constitution as compared with those of foreign lands, a very young people, developing a comparatively new continent, and it is very desirable to maintain some sort of a check upon Congress, at least for the next few generations. It is very desirable to have a document which is outside the reaches of the whims of a legislative majority. The uncertainty and instability which inevitably follow the abolition of checks upon Congress would have a most disastrous effect upon our economic and other social institutions. Even though we admit that a Congress and a public, accustomed to unlimited legislative power, might not be guilty of excesses, it must be realized that a sudden, or too rapid, removal of constitutional restrictions would very likely inaugurate an era of such excessive legislative meddling with private rights as to interfere materially with the proper development of our social institutions. Hence, we are faced by the proposition that the rigidity of the amending process must be softened by degrees and that a complete "about face" not only would be unwise but would be dangerous. Regardless of one's objection to the present amending process, one is compelled to seriously question the advisability of low-



ering the written Constitution of the United States to the level of ordinary statutes.

To suggest an ideal amending process is not the function of these pages. In general, it might be said that much of the criticism of the present method would disappear if the majorities required for proposal and for ratification, respectively, were lowered. To require a two-thirds vote of both houses and the approval of three-fourths of the states makes each step too difficult. Perhaps a majority of each house for proposal and a majority of the states for ratification would make amendment easier without making it too easy. Under this scheme, the proposal would have practically the same status as ordinary legislation, but would not be in force until adopted by state action. Perhaps, in order to avoid possible sectionalism, the majority of states supporting an amendment might be required to include states from more than one compact and contiguous area. Some of the proposals recently made have included a referendum by the people, but it is by no means a settled fact that such a change would mean greater facility of amendment.

Anyone who objects, as we are now doing, to placing the written Constitution on the same basis as statutes, is faced with the situation in the European countries where the written constitution may be changed in practically the same way as are statutes. The answer is that we are still too young and impulsive to discard the constitutional checks upon our legislatures, for it must be admitted that the lack of such checks is not on the whole a handicap in Europe. Whatever difficulties Europe finds itself in—and they are many—are not traceable to the flexibility of her constitutions.

CHANGES IN THE CONSTITUTION IN THE BROAD SENSE.  
—So far in this chapter we have been discussing the

problems involved in changing the *written* Constitution. The preceding chapter, however, makes it clear that there are other parts of our constitutional system which are also subject to change, and a discussion of constitutional changes is not complete without some attention to the growth and development of fundamental law outside of the written document. Here we have the possibility of much greater flexibility than exists in connection with the Constitution proper. A whole is changed by changing one or more of its parts, and the Constitution, broadly speaking, may be changed and developed through changes in any one or more of its five parts. These five parts, as already enumerated are: (1) the written Constitution, (2) fundamental statutes, (3) fundamental treaties, (4) fundamental court decisions, and (5) important political customs; and whenever any one of the last four of these factors is changed there is constitutional change in the broad sense, just as truly as when the written document is formally amended.

CONSTITUTIONAL CHANGE THROUGH STATUTES.—The framers of the Constitution very wisely refrained from encumbering that document with details. The ten departments at Washington are clearly a fundamental part of our governmental system, and yet there is scarcely more than one allusion to them in the Constitution. Who shall hold the office of President in case of a vacancy in the Vice-Presidency as well as the Presidency? Such a fundamental question as this one was answered by a law passed in 1887, providing under such circumstances for the succession, in a definitely prescribed order, of members of the Cabinet. How large shall the House of Representatives be and how shall the membership be apportioned among the several states? These are very important questions which are answered by statute. What governmental agency shall have charge of railroad

regulation? How shall appointments to government positions be made? On the basis of political pull or on merit? All of these and hundreds of other problems, fundamental in their nature, are within the province of congressional authority. Such a vital matter as the organization of the federal judicial system is almost entirely based on the statutes. We find Congress constantly outlining the necessary details and filling in the gaps in our political structure left, perhaps purposely, by the framers of the Constitution. If Congress should establish a national department of education, or should increase the membership of the House of Representatives by one hundred members, or make any one of ever so many changes within the scope of its power, we have constitutional growth fraught with as much importance as though certain portions of the written Constitution were formally amended. Here the flexibility is as great as Congress sees fit. If our national legislators are inclined to transfer the regulation of railroads from the Interstate Commerce Commission to the Department of Commerce, such an important and fundamental change is entirely within their discretion. So Congress, while exercising only a part of the power of formal amendment to the written Constitution is vested with vast power over the Constitution in the broad sense, and it may make any changes in our governmental structure not actually in violation of the written Constitution.

CONSTITUTIONAL CHANGES THROUGH TREATIES.—This is far from being as prolific a source of constitutional change as the statutes, and, up to the present, our policy of isolation has kept at a minimum the number of international agreements which fundamentally affect our government. Nevertheless, all important treaties have some effect upon the nature of government. The treaty under which Louisiana was purchased, for example, represents,

in a sense, a step in the evolution of our constitutional system. As international relationships become increasingly complex and the need of international coöperation correspondingly greater, there are likely to be an increasing number of treaties vitally affecting our Constitution. Some of these have already been made, as, for example, the international agreements for naval disarmament. Here we have a set of treaties which prescribe the nature of our naval building program. The possibilities of constitutional changes through treaty-making are great and it is not unlikely that the student of the future, interested in familiarizing himself with the custom of constitutional change in this or any other country, will find it necessary to devote more time to the study of treaties than is needed for the same purpose by the student of to-day.

CONSTITUTIONAL CHANGE THROUGH COURT DECISION. —The importance of court decisions in the evolution of our Constitution cannot be overemphasized. The student of constitutional law, very properly, spends most of his time discovering the views of the Supreme Court on matters involving our fundamental law, and most of the space of this volume will be devoted to a discussion of judicial interpretation of the Constitution. Whatever may be said about the rigidity and formality of the written Constitution as far as its actual wording is concerned, the process of constitutional change is going on constantly through the expression of our courts. Almost every chapter which follows will contain illustrations of constitutional evolution through the decisions of courts in actual cases.

When the Supreme Court interprets a word or a phrase of the written Constitution to mean a particular thing, there is only one way in which the effects of such an interpretation may be canceled, unless the court later

reverses itself, and that is by constitutional amendment. Let us suppose that Congress should interpret the word "beverage" as used in the Eighteenth Amendment to mean only liquids which are imbibed after nightfall. Such a decision would necessitate further amendments to the Constitution if prohibition were to continue as a national policy. A new amendment might perhaps state that a beverage is to be considered as a drink regardless of the time of its consumption. A few years ago, in interpreting the word "incomes," which appears in the Sixteenth Amendment, the Supreme Court held that the term does not include stock dividends, and as a result of this decision the federal government cannot class stock dividends as income nor levy an income tax on such dividends unless the Constitution is further amended. In 1868 the court held that the word "commerce" as used in the Constitution does not include the business of insurance. This decision has made the federal regulation of insurance as a part of interstate commerce impossible.

CONSTITUTIONAL CHANGE THROUGH CUSTOM.—The development of the American constitutional system through custom is one of the most fascinating aspects of our constitutional history. Here as in every other country, a body of custom and tradition overlaps our more formal fundamental rules and principles. The many customs and practices of our political parties has had more influence on certain governmental functions than constitutional amendments or congressional legislation. It is the caucus of the majority party which in reality chooses the Speaker of the House of Representatives in spite of the constitutional provision that he be chosen by the House. In fact, the process of lawmaking is overlaid with a mass of party customs which is scarcely recognized in the Constitution or in the statutes. Changes due to custom come slowly, almost imperceptibly

and frequently without conscious direction. The conscious direction of custom is sometimes most difficult. It would probably be even more difficult for a candidate to overcome the popular aversion to a third term for the Presidency than it would to amend the Constitution; and the chances of persuading a presidential elector to disregard custom and to use his discretion in casting his vote would be very small indeed. In spite of the conservatism of custom there is, nevertheless, a steady and constant change which, as far as it affects our Constitution, is a part of constitutional growth.

A constitution must be a living, growing, and evolving body of principles. "Times make ancient good uncouth" and a fundamental law must change with changing conditions. Whatever may be said of the rigidity and formality of the *written constitution* it is certain that the American constitutional system *broadly speaking* has been and still is undergoing constant change.



## CHAPTER III

### THE COURTS AND THE CONSTITUTION

**F**EDERAL COURTS AND STATE COURTS.—Because we have a dual (federal) government—the nature of which will be described in the next chapter—we find two distinct sets of courts in the United States. Not only is there a complete system of federal courts covering the entire nation, but there are forty-eight different state systems as well. The state courts have practically no connection with the federal courts. The Supreme Court of Ohio, for example, is no more a part of the federal judicial system than is the governor of Ohio one of the administrative subordinates of the President of the United States. In the same way that it is sometimes difficult to explain to some one not acquainted with our government that a governor need not take orders from the President, it may also be hard to make him see the hierarchy of courts in the state is not a part of the federal judicial scheme. Even the average American is likely to become confused by the seeming duplication of court systems which exists around him. If he speaks of the supreme court it may be a reference to one of two courts, either one of which has jurisdiction over him, because in practically every state in the Union—New York, for example, is one of the few exceptions—the highest state court is called by the same name as that of the highest federal court. Many states have circuit courts and district courts which may thoughtlessly be confused with the federal courts bearing the same names.

While this chapter deals almost entirely with the fed-

eral court system, which, naturally, is of prime importance in the development of our constitutional law system, it should be remembered, however, that it is the state courts that handle most of the litigation which takes place within the limits of the United States and that the overwhelming majority of criminal cases also are tried, not in the federal, but in the state courts. This means that the average citizen, if he comes into court as a plaintiff or as a defendant, or if he is called as a witness or as a jurymen, will find in a great majority of the instances that it is a *state* rather than a *federal* court which is in charge of the case.

ORGANIZATION OF THE FEDERAL COURTS.—The constitutional provisions relative to the organization of the federal courts are very meager. Section 1, of Article III states that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress from time to time may ordain and establish. The judges, both of the supreme and of the inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office. These are the only references to organization except the provision in Section 2 of Article II that judges of the Supreme Court shall be appointed by the President by and with the consent of the Senate.

Only one court, the Supreme Court, is provided for in the Constitution and even in the case of the Supreme Court no details are given. Congress has, through the famous Judiciary Act first enacted in 1789 and amended at various times, provided for the structure and jurisdiction of the judicial system. Below the Supreme Court two grades of courts have been established.

The District Courts, eighty-two in number, are the



lowest grade, or courts of first instance. While the United States is divided into eighty-two districts, the number of judges is considerably greater, as in some districts there is more than one judge. The number of judges in a district varies with the amount of litigation. A populous district may have as many as six judges, but most districts have only one. All together there are 125 district judges. This number as well as the number of districts may be changed at any time by law.

The Circuit Courts of Appeal are the next in order. Of these there are nine—one for each of the nine circuits into which the entire country is divided. In each circuit there are from two to four circuit judges. Each of the judges of the Supreme Court is also assigned to one of these circuits, but seldom finds time to sit as a member of the Circuit Court. While these courts are oftentimes referred to in ordinary speech as “circuit courts” their official name is “Circuit Courts of Appeal.” This point is worth remembering because of the confusion which might otherwise result when one discovers that up to a few years ago the Judiciary Act provided not only for a Circuit Court of Appeals, but for a Circuit Court as well. Therefore it is safest to use the full term “Circuit Courts of Appeal” to make it perfectly clear that the reference is not to the “circuit courts” formerly a part of the federal judicial system.

At the head of the federal courts stands, of course, the Supreme Court, made up of nine members. One of these is designated as chief justice, who, while he is little more than a chairman of the Supreme Court and has no more legal influence upon decisions than any of the associate justices, has important supervisory powers over the lower federal courts. Six judges must be present when a case is argued and a majority of the judges

who sit in a case must concur in a decision. If the majority cannot reach an agreement, a rehearing of the case is ordered. When the court is ready to make a decision, the chief justice appoints one of the majority to write the "opinion" of the court. These "opinions," whenever they deal with questions of constitutional interpretation, are most important sources of constitutional law. If a judge agrees with the majority but for different reasons than those given in the opinion, he may write a "concurring opinion," which also is a legal source of law. Judges who disagree with the conclusions of the majority may, if they so desire, write "dissenting opinions." These, of course, do not have the legal status of majority opinions, but are nevertheless of interest to students of our legal system.

The opinions of the Supreme Court are published at regular intervals by the government. The "Reports," as they are called, are issued and numbered by volumes and over 250 volumes have already been published. Cases are cited by volume and page, 100 U. S. 50, for example, indicating volume 100 and page 50 of the United States Supreme Court Reports. Previous to 1874, when the numbering of the reports began with Volume No. 91, the reports were named after the reporter who edited them, and are listed as follows: 1790-1800, Dallas, four volumes; 1801-1815, Cranch, nine volumes; 1816-1827, Wheaton, twelve volumes; 1828-1842, Peters, sixteen volumes; 1843-1860, Howard, twenty-four volumes; 1861-1862, Black, two volumes; 1863-1874, Wallace, twenty-three volumes. These volumes are cited by the name of the reporter rather than by number—for example, *Marbury v. Madison*, 1 Cranch 137. These decisions are also available in many other forms and editions. Private law-publishing concerns frequently combine the official volumes in various ways for convenience or

economy in publication, but the citations described in this paragraph are always correct and official. The decisions of the lower courts are also published, but they, naturally, are not of the same importance as those of the Supreme Court.

In addition to the three grades of courts described above—the Supreme Court, the Circuit Courts of Appeal, and the District Courts—Congress has established several special courts. One of these is the Court of Claims, which, as its name indicates, hears the cases of those who have claims against the United States. This court has no power to order payment of the claim, but recommends an appropriation by Congress in case it finds the claim a valid one. Another special tribunal is the Customs Court, which deals with disputes arising from the enforcement of the import tax laws. Congress has also provided for a system of courts for the District of Columbia and for a system of territorial courts in each of our outlying possessions. None of these special courts, however, are of great moment in the field of constitutional law.

WHAT IS MEANT BY JURISDICTION?—By jurisdiction we mean the right of a court to hear and determine cases. When we speak of jurisdiction we have in mind certain defined limits within which a court has authority. These limits may be territorial—that is, the court may have the right to try cases involving acts which have been committed within certain definite geographical areas, or the limits may be personal, such as the authority to try cases involving certain persons—for example, the jurisdiction of juvenile courts over young people; or the limits may be based on the subject-matter involved, such as the authority of a probate court over wills.

When we speak of a court having original jurisdiction

we mean that cases may be begun in that court. If certain types of cases are brought on by appeal from a lower court we say that the higher court has appellate jurisdiction. If two courts, or two systems of courts, each have jurisdiction over certain cases so that the parties may choose either one, we say that the jurisdiction is concurrent. If the jurisdiction is not shared by another court the jurisdiction is said to be exclusive. A court from which no appeal may be made is said to have final jurisdiction.

The federal courts have only such jurisdiction as is given them by the Constitution. All other cases are within the jurisdiction of the state courts. Hence we say that the state courts have general jurisdiction—that is, they have authority over all cases not specifically placed under federal jurisdiction, while the federal courts have what might be termed a limited jurisdiction. This does not mean, however, that the federal courts have no cases of importance within the scope of their powers. While it is absolutely true that the federal courts have only such jurisdiction as the Constitution gives them, it is also true that the Constitution has listed several very important classes of cases as coming under federal authority. We shall now examine very briefly what the Constitution has to say about the extent of the federal judicial power.

**JURISDICTION OF FEDERAL COURTS.**—The Constitution gives a list of the cases which are to come under federal jurisdiction. These cases are of two distinct types: First, those which are given to the federal courts because of the *subject* or *matter* involved, and, second, those which are so placed because of the *parties* involved.

On the basis of subject-matter all cases arising under the Constitution, laws, and treaties of the United States are placed under federal jurisdiction. This, obviously,

is a most important type of case and, naturally, belongs in the federal courts. Any cases which relate in any way to the Constitution or to laws and treaties passed pursuant to it, may be tried in the federal courts.

Only one other class of cases comes under federal jurisdiction on the basis of subject-matter and that is cases in admiralty and maritime jurisdiction. This relates to all matters pertaining to ships and to the sea, including navigable rivers and inland seas. All maritime contracts and damage cases, and many other matters arising out of disputes involving ships and navigable waters, come under this head. In England the admiralty courts handle only those cases arising on the sea and on portions of the rivers that are affected by the tide. In the United States, however, admiralty and maritime jurisdiction has been interpreted to include navigable streams regardless of their length and to include also the Great Lakes. Hence a collision between two vessels on Lake Michigan, while occurring within the territorial waters of a state, may, nevertheless, be placed under federal jurisdiction. While these cases are numerous, they are for the most part of comparatively small importance in the study of constitutional law. Frequently, however, and especially in time of war or other international difficulties, the decisions in admiralty and maritime jurisdiction are of great importance in developing international law.

On the basis of the parties involved there is a much larger list of kinds of cases which belong under federal jurisdiction, although this does not mean that a greater number of cases come from these sources. There are more *kinds of cases* under this head than under subject-matter, but not necessarily more *cases*. In all there are six types of cases in which the nature of the *parties* involved brings the action into the federal courts. In



the first place, we have all cases involving ambassadors, ministers, and consuls. This is a natural classification because, obviously, it would be unwise to place cases of this type outside of federal control. Secondly, there are those cases in which the United States is a party. A suit against the federal government should hardly be heard in a state court, and even a suit brought by the United States against a state is by constitutional provision also brought in the federal courts.

In the third place we find all cases between citizens of different states, or between citizens of a state and of a foreign country. This situation is frequently described by the phrase "diversity of citizenship." As will be pointed out in a later paragraph, not all cases listed under federal jurisdiction are given exclusively to the federal courts. In the Judiciary Act, Congress provides for concurrent jurisdiction in certain fields between the federal and state courts. In other words, Congress has not seen fit to give the courts all the power which it might constitutionally give it. Under the head of diversity of citizenship Congress has placed all minor cases under state jurisdiction. If, for example, an Ohio grocer located a few miles from the Indiana line should find it necessary to bring suit for collection of accounts against a number of his debtors in Indiana, it would be unwise to clutter up the federal courts with a mass of such actions. Because of the great number of petty cases which can easily arise across any one of our many artificial, and otherwise easily crossed, interstate boundaries, Congress has opened the federal courts only to cases of diversity of citizenship involving more than \$3,000.

In the fourth place, the federal judicial power extends to all cases between two or more states. In order to belong in this class, a case must involve a *bona fide* controversy in which the states, as states, are directly in-

volved. If the suit is brought by one state against another in order to settle the grievances of individual citizens of the suing state, it is *not* in this class. For example, suppose that Mr. A of Illinois has a claim against the state of New York. If he is to sue for this claim the action must be brought in the New York courts, which naturally gives a certain advantage to that state as against the plaintiff from outside its borders. Let us suppose that Mr. A, in an endeavor to get the case into the federal courts transfers, or assigns, his claim to his own state. Now Illinois, and not Mr. A, has a claim against New York. Does this mean that Illinois now may bring a suit against New York in the federal courts on the ground that this is a controversy between two states? The federal courts have said that such cases are in reality not cases between states, but rather a collusion on the part of the creditor and his state seeking to remove the case from the courts of the debtor state. If such cases were permitted in the federal courts it would mean that any state might make common cause with any of its citizens holding bonds or other evidence of indebtedness of other states and use the courts of the United States as a sort of a collection agency.

A most interesting question arises out of the federal jurisdiction over controversies between states. What would happen if a state should refuse to obey an adverse decision of the United States courts? What methods would be employed to compel the acceptance of a ruling of the court? Suppose that Minnesota and Wisconsin should engage in another boundary controversy, as they already have—and as many other states in the Union also have—and that the matter should be brought before the federal courts. Suppose further that the loser in the federal courts should refuse to give up the disputed territory. What would, and what should, the federal govern-

ment do under such circumstances? Up to the present no compulsion has been necessary because the losing state has always accepted the decision. The only possible exception occurred in the case of *Virginia v. West Virginia*,<sup>1</sup> when the latter waited a considerable period before it began payment of the judgment brought against it. In connection with this case, which was long drawn out, the Supreme Court suggested that forcible means might be used to compel the losing state to pay the judgment, but that Congress is the proper agency to determine what measures should be used. Before the matter was taken up by Congress, West Virginia reluctantly agreed to pay the judgment. When the United States courts hear cases between states the situation resembles somewhat the hearing of international cases, and it is insisted by many champions of the World Court that, if the forty-eight states of the American Union are willing to submit to a common judicial process, the fifty or more nations of the world should take steps in the same direction through the foundation of a world tribunal.

In the fifth place, all cases brought by a state against the citizens of another state or of a foreign country are under federal jurisdiction. In the original Constitution all cases between a state and the citizens of another state or of a foreign country were placed under federal jurisdiction regardless of whether the suit was brought *by* the state or *against* it. When in 1792 a Mr. Chisholm of New York brought suit against Georgia, the federal courts, under the Constitution as it then stood, very properly took jurisdiction. Against this action Georgia vehemently protested, and so successfully that the Eleventh Amendment was adopted, which takes out of the jurisdiction of the federal courts all cases brought *against* a state by citizens of another state or

<sup>1</sup> 246 U. S. 565.



of foreign countries, leaving, however, under federal jurisdiction cases brought *by* a state against citizens of other states or countries. The Eleventh Amendment is based on the theory that a state should be sued by a citizen only in its own courts. As it now stands, if the state of Ohio wishes to sue Mr. A of Indiana it is brought in the federal courts, but if Mr. A of Indiana sues the state of Ohio it must be done in the courts of Ohio.

The sixth and last item, which at present is of comparatively little importance, includes cases between citizens of the same state claiming land grants from different states. Cases of this kind were of importance in our early history, when the claims of the seaboard states to Western lands often overlapped and two citizens of Delaware, for example, might claim the same piece of land west of the Alleghenies, one because of grant from Connecticut and the other by grant from New York. Obviously the proper place for such a case was in the federal courts.

The above discussion enumerates the types of cases to which the federal judicial power extends. It does not follow, however, that all these cases are tried *only* in the federal courts. In many other instances Congress has given concurrent jurisdiction to state courts. This means that the party beginning the suit may bring it in either the state or the federal courts. In general, petty cases are left to the state courts even though they may come under the heads listed as being under federal jurisdiction. It should be clearly remembered that all cases not definitely placed in the hands of the federal courts are handled by the state courts.

So far under this heading we have discussed the question of federal jurisdiction as opposed to state jurisdiction. Another question of great importance to the constitutional lawyer but one which we will not raise here

involves the question of the jurisdiction of the several federal courts. If a case is under federal jurisdiction the lawyer must know which of the several federal courts is the proper one to hear the case. These details, which are clearly outlined in the Judiciary Act, need not detain us here. It is sufficient to say, in general, that most cases begin in the District Courts and may be appealed to the Circuit Court of Appeals, which in many cases has final jurisdiction. Certain types, including all constitutional questions, may be further appealed to the Supreme Court. A few cases, but not many, are shunted around the Circuit Court of Appeals and are brought directly from the District Court to the Supreme Court.

One point in this connection should be mentioned, however, and that is the constitutional provision that the Supreme Court shall have original jurisdiction over two types of cases; first, those involving ambassadors and other public ministers, and second, those in which a state is a party. In all other cases, says the Constitution, the Supreme Court shall have only appellate jurisdiction. This means that Congress may not increase the original jurisdiction of the Supreme Court. When in our early history Congress attempted to give the Supreme Court original jurisdiction over the issuance of the writ of mandamus, the famous case of *Marbury v. Madison* resulted. This case held that Congress could not give additional original jurisdiction to the Supreme Court.<sup>1</sup> Because it involved the first instance of a law being declared in violation of the federal Constitution this case is perhaps the most important in American constitutional history.

**EQUITY CASES.**—The federal courts are equity courts as well as law courts. In the history of English law there developed outside of the common-law courts a set

<sup>1</sup> 1 Cranch 137.

of tribunals which were intended by the crown to see that justice was given in those cases where justice was not being done through the ordinary courts. As time went on, however, these equity tribunals soon became what was virtually a separate set of courts with certain decisions and customs, and inevitably there developed a system of rules, known as equity, almost as rigid as the common-law. Our federal courts have jurisdiction over equity cases as well as law cases. This is also true of most of the state courts. In a few states, however, New Jersey being an example, there are separate courts for the administration of law and of equity. In England, the home of the separate equity courts, the two sets are now combined into one hierarchy and each court handles equity cases as well as others. There are certain writs developed under equity, such as the injunction, which, of course, are used by the federal courts as are the common-law writs. The distinction between law and equity is not an important one to the student of constitutional law.

**THE POWER OF THE COURTS TO DECLARE LAWS UNCONSTITUTIONAL.**—The courts of the United States have the power to declare that a law passed by Congress is null and void if it is in violation of the written Constitution. As the Supreme Court has final jurisdiction over all such matters, it might be said that the Supreme Court has this power, for no decision of a lower court is looked upon as finally settling a point of constitutional law. This power to declare laws invalid when they violate the Constitution is called judicial review. In no other great country in the world do the courts have this power, with the possible exception of the South American countries, two or three of which are entitled to classification as great countries. In all European countries the courts, practically without exception, accept and enforce all laws

passed by the legislative agencies regardless of possible violation of the constitution. In these countries the question of whether a law is constitutional is decided by the legislature—the direct representatives of the people. In America the final arbiter is the Supreme Court—much farther from the people but, nevertheless, made up of expert constitutional lawyers, who are better qualified to interpret technical constitutional provisions than are the members of a legislature. Nevertheless, we are unique in America in allowing the courts the last word in constitutional interpretation. Most of those who have studied the question are of the opinion that it is wiser in a comparatively new country like ours to leave this power in courts than to make the legislature the final authority on constitutional questions.

Some of the opponents of judicial review have claimed that the Supreme Court has usurped the power to declare laws unconstitutional. Color is given to this claim by the fact that nowhere in the Constitution is there any express provision for the exercise of this power. It is not fair, however, to call the action of the Supreme Court a usurpation because a careful study of the Constitutional Convention of 1787 reveals that the great majority of the framers of the Constitution intended that the courts should have the power to declare laws unconstitutional. This, of course, does not settle for all time the wisdom of judicial review. It does, however, show that there is little basis for the statement that the exercise of such powers by the courts is in violation of the spirit of the Constitution.

In the case of *Marbury v. Madison* in 1803, when the doctrine of judicial review was first applied, John Marshall, the great expounder of the Constitution, pointed out that the courts must obey the Constitution and that

they must also obey the statute laws, but that, where there is a conflict between the two, there is but one course to follow, and that is to obey the higher of the two, namely the Constitution, and to ignore (in effect nullify) the statute law. This statement assumes, of course, that a law of Congress ranks below the written Constitution. This assumption the constitutional systems of Europe do not follow. Since *Marbury v. Madison* between fifty and sixty (fifty-three up to 1924) federal laws have been declared unconstitutional. This is not a large number considering the vast number of laws passed by Congress. The small number is in part accounted for by the fact that Congress tries studiously to avoid enacting legislation which will not pass the scrutiny of the courts.

THE SUPREME COURT AND STATE STATUTES.—If any state passes a law which violates the federal Constitution it is declared null and void by the Supreme Court as soon as any case arising under its provisions comes before it. Furthermore, a provision of a state constitution may be held invalid by the federal court if such provision is in violation of the federal Constitution. Here there is even more reason for such judicial review than in the case of federal legislation, for, if there were no federal agency to check encroachments of the states upon the national government and to prevent unconstitutional action on the part of state agencies, the federal union would mean little or nothing. If, to use an extreme illustration, New York should pass a law or an amendment to the state constitution providing for coinage of money by the state in spite of the clear prohibitions in the federal Constitution against such action, it is obvious that the central government would have to declare such a provision invalid if the union of states is to continue. Many of the objectors to judicial review direct their attacks entirely



against the invalidation of federal legislation. They recognize that the several states must not exercise forbidden powers and that they must not interfere with the guarantees which the federal Constitution offers to the individual citizen.

The question of the constitutionality of a state law first arises, naturally, in the state courts, for it is there that state laws are interpreted. If, in a case before a state court, one of the parties in the case claims that any of his rights under the federal Constitution are infringed, the state court decides whether there is any conflict between the state law and the federal Constitution. If such a conflict exists the state law is held void—usually by the supreme court of the state, because a case of such importance is likely to be carried to the highest state court. If the state court holds that the state law is not in violation of the federal Constitution, the party claiming that his rights are violated may appeal to the Supreme Court of the United States. Thus a case which is otherwise purely a state matter goes into the federal courts because it involves questions of constitutionality. If, on the other hand, the state court holds that the state law is in violation of the federal Constitution and therefore invalid, the matter usually stops there. Obviously there is little need for federal attention when the state itself through the agency of its courts admits that the state law is invalid. However, the federal Judiciary Act gives the United States Supreme Court the power to call up such a case also for review. In passing it should be noted that the state courts also have the power to declare state statutes invalid when they conflict with the state constitution. Such cases, of course, are not brought into the federal courts, as they involve only state questions.

**LIMITATIONS UPON THE POWER TO DECLARE LAWS UNCONSTITUTIONAL. POWER EXERCISED ONLY IN ACTUAL CASES.**—The Supreme Court will not declare a law unconstitutional except when a case arises which makes such a decision necessary. It refuses to give advisory opinions and to decide moot cases. Unless there is actual litigation, no decision as to constitutionality is made. Not only must there be a case, but the case must be a real one with issues to be decided. If the plaintiff and defendant are in reality interested in having the decision made the same way but have brought a case to test out the sentiment of the court, the court will refuse to pass on matters of constitutionality.

In this connection it should be pointed out that the court will not pass on the constitutionality of a statute unless a decision is necessary in order to dispose of the case. When a judge in writing a decision fails to stick to the point, we call such a part of the decision *obiter dicta*—that is incidental collateral opinion. The *obiter dicta*, or *dicta*, as they are usually called, are “by-the-way” statements of judges, and often cause confusion in the statement of law. They are not an official part of the decision. If a judge in making decision rambles from the point and says “by the way,” or “in passing,” that a statute is unconstitutional, such a statement is called a *dictum* (singular of *dicta*) and has no legal effect. The sifting of occasional *dicta* from judicial decisions is one of the tasks of the practicing lawyers as well as other students of law.

**STATUTE MUST BE CLEARLY UNCONSTITUTIONAL.**—No law is declared unconstitutional unless it is clearly and palpably in violation of the Constitution. In case of doubt the judge must favor validity of the law. This is a recognition of the fact that the legislature presumably will pass only such legislation as is in accord with the



Constitution. This rule, which is a most salutary one, has in reality been laid down by the Supreme Court for its own guidance and now is a part of our constitutional law. Of course, no one but the judge himself will in a close case know whether he is in doubt. Whenever he is in doubt, however, he must vote in favor of the validity of the questioned statute. Some of the critics of judicial review feel that this rule, under which the statute gets the benefit of the doubt, should go still farther. They contend that, whenever the court—not as separate persons, but as a group—is seriously in doubt, the law should be held valid. Such critics, therefore, object to decisions in which by a close divided vote laws are held unconstitutional. If the nine judges of the Supreme Court cannot agree, say they, is it not an indication that the case is so doubtful that the law should be allowed to stand? A few would go so far as to require unanimity in declaring laws unconstitutional, but others would be satisfied by a provision which would require an agreement by at least seven of the nine judges before nullifying the law. A movement is on foot, sponsored by Senator Borah, looking toward this change. This movement is the result of the criticism of the so-called five to four decisions where the disagreement among the nine judges is obvious. There have been only nine such cases in our history, but many of them have been important. In four others there have been six-to-three decisions.

As the matter now stands, however, the rule of doubt applies only to the individual judges and not to the court as a whole. While it would seem perfectly safe to say that a law passed by a majority of both houses of Congress and signed by the President should be held valid unless the nine judges were fairly well in agreement, the chances are that no such change will be made and that the court will continue to exercise the power of declaring

laws unconstitutional by a majority of one.<sup>1</sup> The criticism of close decisions is directed entirely at cases involving federal statutes. There seems to be little objection to five-to-four decisions in cases involving state statutes.

**PARTIAL UNCONSTITUTIONALITY.**—Sometimes it happens that certain parts of a statute are constitutional and others unconstitutional. In such a situation the valid parts of the law continue in force if the law is of such a nature that the valid portions are not seriously affected by the invalid sections. Very often a statute is not divisible and the nullification of a part in effect nullifies the whole law. In other cases the invalidation of a part may not vitally affect the whole, and under such circumstances the valid portions are not affected by the decision.

**CONSTITUTIONALITY AND UNWISE LEGISLATION.**—The court does not declare a law invalid because it is unwise, but only because it is in conflict with the Constitution. If the judges feel that a statute is contrary to justice and common sense, but can see no violation of the Constitution it must be upheld. As we shall see, however, in a later chapter, there are certain fields in which questions of constitutionality and of wisdom intermingle and overlap. This is especially true of cases under the due process clause which will be discussed in Chapters IX, X, and XI. A law regulating the hours of labor, for example, is not in violation of the due process clause if there is a reasonable relation between the regulation and public health, morals, or safety. The question of reasonable relation very easily becomes one of wisdom. Nevertheless, it is true, as a general statement, that the court will uphold laws, no matter how unwise, if there is no conflict with the Constitution.

**EFFECT OF AN UNCONSTITUTIONAL ACT.**—When a law is declared unconstitutional it is as though it had never been enacted. This leads to possible embarrassment for public officials. If a sheriff takes certain action under a law which is later declared unconstitutional, he is held for anything which he has done under the law which has caused damage or injury to anyone. The seizure of a person's automobile or other property under a law later held invalid makes the official who seizes the property personally liable. He cannot be charged with stealing the property, as he had no criminal intent, but he may be held for all damages. This seems hard on the public official. Until a law is passed upon by the courts he is in a dilemma. If he fails to enforce the law he is accused of laxity. If he enforces it he is liable to a damage suit if the law is not upheld. A public official who is sued for damages as a result of enforcing, in good faith, a law later held unconstitutional may, however, be reimbursed for his losses out of the public treasury, but such reimbursement is entirely at the option of the government and the official has no legal claim upon such payment.

Even though a law is declared null and void it still remains on the statute books. It is still a law, but one which is ignored by the courts. Congress and the state legislature might well begin the practice of repealing immediately any law declared unconstitutional. This would avoid the confusion which results from having a law on the statute books which in reality is not a law at all.

**ATTITUDE OF THE COURTS TOWARD POLITICAL MATTERS.**—There are certain powers granted to the President and to Congress with which the courts refuse to interfere. All matters pertaining to foreign affairs are political, as are all questions as to whether a certain area is under the jurisdiction of the United States. Another question, with which the courts refuse to interfere, is as to which

of two contending state governments shall be recognized by the federal government. The exact time of the opening or closing of a state of war, the question as to whether a certain treaty is actively in force, the question of whether a certain foreign group is to be recognized as an independent state, these and many other similar questions the courts steer clear of, on the ground that they are political in their nature. It is impossible to define clearly the extent of political questions, but in general it should be remembered that matters closely relating to sovereignty, foreign relations, and the determination of what is a recognizable state government are held to be outside of the jurisdiction of the courts.

## CHAPTER IV

### POWERS OF THE FEDERAL GOVERNMENT

**E**NUMERATED FEDERAL POWERS.—Some governments exercise only such powers as have been given them. All authority which such governments possess comes from grants of power. Other governments have what might be called inherent powers. They exercise governmental powers not because these powers have been given them, but because such powers are an inalienable part of their natures. So we may say that governmental power is divided into two classes on the basis of the source of the authority to exercise the power. First, there is *delegated* power which is derived from grants of power from outside sources. Because powers which are delegated, or given, must be mentioned and listed, we sometimes call such powers *enumerated*. Second, there is inherent power which is exercised simply because it is an essential part of the government. It is there simply because *it is there*.

Strange as it may seem to those Americans who have given little thought to the matter, the government of the United States has only enumerated, or delegated, powers. Our Constitution is a grant of power from the people of the several states to the federal government—turning over to it certain governmental authority. This means that the United States government does not possess general inherent power, but only such powers as are granted to it by the Constitution. On the other hand, the several states have inherent power. According to our constitutional theory, each of the former colonies at the time of

the adoption of the Constitution was a completely independent state with all powers which inhere in the government of an independent country and each state to-day possesses all powers which have not been taken away by the national Constitution. The states gave certain powers to the federal government, such as, for example, the authority over post offices and post roads. As a result, the states have no postal power. The states not only gave away some of their powers to the central government, but they went farther and actually denied themselves certain authority—such as the right to emit bills of credit, to pass any *ex post facto* law, to pass any law impairing the obligation of contracts or to grant any title of nobility. These and several other powers the states may not exercise because of constitutional prohibitions. All of these powers might be exercised inherently by each of the states if it were not for the fact that the Constitution forbids such exercise. So we may say that the *federal government has only delegated or enumerated power, while each state has inherent power.*

The power exercised by the several states may from another angle be described as residual power. By this we mean the powers which are left over after we subtract from the complete powers which the states originally had all those powers which (1) have been given to the federal government and which (2) have been denied to the states. In this respect each of the forty-eight states is on the same basis. Each state upon admission to the Union is placed on exactly the same footing as every other state. Hence, the same situation regarding residual and inherent powers exists in the thirty-five states which were organized after the adoption of the Constitution as exists in the original thirteen. Arizona, the youngest of the forty-eight states, is in exactly the same position as New York or Virginia.



Whenever the federal government passes a law the question is, Has the power necessary to pass such a law been given to it? When a state passes a law the question is a different one—namely, has the power necessary to pass such a law been given away or denied it? If the national Congress should pass a law regulating marriage and divorce the proper question would be, Is this power to regulate marriage and divorce one of the enumerated ones? As it is not, the law would be invalid. If the state of New York regulates marriage and divorce, the proper question is not whether the power has been given to New York, but whether it has been granted to the federal government or has been denied to the states. As the federal Constitution is silent on this subject, the power resides in the several states, and New York may regulate.

Let us imagine that I have two boys—John and James, let us say—under my control. I say to John, “To-day you may do only those things which I say you may, and here is a list of the things which you are permitted to do.” To James I give another list of activities and say, “To-day you may do whatever you wish except the things which are on this list.” John cannot go fishing unless “fishing” is enumerated on his list. James may fish if his list is silent on that subject. In a marked degree the federal government is in the position of John, while the state is in the position of James. The federal government must constantly look to its enumeration, or “list,” for grants of power, while the state needs to avoid only the powers which are prohibited or which have been granted to the federal government. This does not mean that the government of the United States is weak and helpless. It has, to be sure, only delegated powers, but many of these are very extensive. A government which has the power to declare war, to tax, to regulate inter-



state commerce, and many other wide powers is far from being impotent.

ENUMERATED POWERS, EXPRESSED AND IMPLIED.—That the federal government has only enumerated or delegated powers is one of the most fundamental truths of American constitutional law. Another truth of equal significance is that delegated favors may be *implied* as well as expressly stated. When a particular power is expressly given, this naturally *implies* also the power to do whatever is necessary to carry out the express grant. If John—to return to our illustration—finds ball-playing listed among his permitted activities, this would no doubt imply the right to go to the attic to get the ball bat which is stored there, even though going to the attic is not specifically listed.

From the beginning of our history there have been two opposing views as to implied powers. One view is that held by the liberal constructionists—those who wish to stretch the powers of the federal government as much as possible. This is the view held by the Federalists and expounded so effectively by John Marshall during his long service as a member of the Supreme Court. It is the view which has dominated our constitutional history throughout its entirety and is the one generally accepted by students of our Constitution. The liberal construction of the Constitution means extensive implied powers. The opposing view is held by what might be called the strict constructionists—those who wish to restrict the powers of the federal government as closely as possible to the expressly delegated powers. The champions of state rights naturally favored this view because the more the federal powers are restricted the more extensive will be the residual powers of the states. Throughout our history and especially since the Civil War this view has had only a minor influence. As a result there has been

a continuous extension of the power of the federal government. It might be mentioned that the last few years have seen some reaction in the public mind against the extension of federal power. This reaction has not, however, been reflected to any important degree in the decisions of the Supreme Court, except in the child-labor cases, which will be discussed later.

The liberal view is supported by Clause 18, Section 8, of Article I of the Constitution. Section 8 consists of an enumeration of the powers of Congress and Clause 18—the concluding one of this section—provides that Congress shall have power “to make all laws which shall be *necessary* and *proper* for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.” The strict constructionists contended, unsuccessfully, that only those things which were *absolutely necessary* are to be included, while the liberal constructionists have succeeded in construing *necessary* as meaning *convenient* or *useful*.

When the question arose as to whether the United States had the power to establish a national bank, the strict constructionists insisted that, because the power to do so was not expressly given, such action would be in violation of the Constitution. The liberal constructionists contended that this power was implied by the express power to coin money, to levy taxes, and to borrow money on the credit of the United States. In a famous decision handed down in 1819, Chief Justice Marshall upheld the liberal view, pointing out that it could not be expected that all express powers should be minutely described.<sup>1</sup> On the basis of this and later similar decisions the implied powers have been given a very extensive application. One of the best illustrations of the extension of

<sup>1</sup> McCullough v. Maryland, 4 Wheaton 316.

the implied powers is in connection with the commerce clause. The federal government is given express power to regulate commerce among the several states. Under this power Congress has passed laws prohibiting the carriage of lottery tickets and the transportation of women for immoral purposes in interstate commerce. The federal government has no authority to regulate morals, and yet the commerce clause has been interpreted to imply such control over persons and things transported between states. Neither has the federal government any express control over public health, and yet Congress has prohibited the transportation, between states, of impure foods and drugs and has compelled interstate shippers to submit to federal inspection—meat packers, for example—in order that their products might be shipped out of the state. In one instance at least the Supreme Court has held that Congress has stretched its implied power over interstate commerce too far. This was when it passed a law prohibiting employees of child labor from shipping their products in interstate commerce. This law was declared unconstitutional by a vote of five to four on the grounds that such a law did not bear a close enough relation to the express grant of power.

The war power has generally been regarded as implying a vast expanse of power. When at war it seems that the federal government has the implied power to do whatever is necessary to carry out its express power to declare war. This probably covers any activity which is necessary to bring the war to a successful conclusion.

In spite of the wide extension of implied power we must keep clearly in mind, however, that the federal government has only such implied powers as are reasonably inferred from the express powers. Whenever any federal legislation is enacted in a new and untried field it

is not enough to say simply that such power is implied from the mere fact that it is desirable for the central government to enjoy such authority. If the legislation is to be upheld, its relationship to express grants must be shown. To use our illustration again, suppose that with his list of permitted activities John proceeds to chop down a cherry tree. When confronted by the fact that such action is not among the things which he is permitted to do, he insists that he cut the tree down to use the trunk for a ball bat and feels that he is justified in doing this, as ball-playing is one of the things he finds on his list of activities. No doubt the most indulgent parent would hold this to be an unwarranted implication arising from the specific permit to play ball. In the same way a government with powers limited by delegation and enumeration cannot constitutionally make an unreasonable use of implied powers. The Constitution does not give the government of the United States the power "to make all laws which are necessary and proper," *but* "to make all laws which are necessary and proper *for carrying into execution the foregoing powers. . .*" The preamble of the Constitution, even though it enumerates the purposes for which the Constitution is established, does not constitute a grant of powers to the federal government.

Another most important point in connection with the federal government is that, in spite of the fact that the United States has only powers which have been granted to it by the states, these powers are *irrevocable* by the states. The powers which have been given over to the central government are lodged there permanently—always excepting, of course, a change by constitutional amendment. No state or group of states can say, "We gave these powers to Uncle Sam, but now we revoke the grant." That is, the delegated powers cannot be with-

drawn even by those who gave them; or, to put it in still another way, there is no right of secession or nullification under our Constitution.

Three fundamental points stand out, then, in connection with federal powers: first, the government of the United States has only *delegated* or *enumerated powers* and does not possess inherent power as does the government of England, France, and most countries; second, the federal government exercises not only those powers which are specifically granted in the Constitution, but also very extensive powers which are *implied* by the express grants; and third, powers granted to the federal government are *irrevocable*.

RELATION OF STATE GOVERNMENT TO COUNTIES AND MUNICIPALITIES.—The relation between Ohio, for example, and the counties and cities within its borders is very different from the relation between the United States and Ohio. Ohio does *not* receive power through delegation *from* the local units under its jurisdiction. On the contrary, Ohio delegates power *to* the local governments. Every city, every county, every township and school district in the state has whatever power it enjoys *not* inherently, but through grants from Ohio. Furthermore, these grants are usually revocable. If Ohio gives a city or a county certain powers, Ohio may take them away. If they are given through the state constitution they are revocable by changing the state constitution. But most powers are delegated by the state legislature and may be withdrawn at will by the same agency. What is true of Ohio is true of every other state. We sometimes hear Americans exhibit their ignorance by stating complacently that Akron, for example, is to Ohio as Ohio is to the United States. A study of these relationships reveals clearly that the theory upon which our national Union is formed is quite different from that on which the sub-



divisions of a state are joined together, and this is a distinction with which the average American might well familiarize himself.

RELATION OF THE FEDERAL GOVERNMENT TO TERRITORIES.—Alaska's relationship, for example, to the federal government is a very different one from that of Ohio. The Constitution gives Congress full powers over territories, and federal laws may be passed regulating matters in the territories which would be quite outside of federal powers in the states. Usually Congress establishes a territorial legislature, and delegates to it certain powers of local government. Here we have a delegation *by* the United States, and the relationship of the central government to Alaska is not unlike that of Ohio to Akron. The government of territories and constitutional questions related thereto will be discussed in the next chapter.

So far in this chapter we have discussed the constitutional theory upon which our federal system of government is based, the purpose being to bring out as clearly as possible the extent of the federal powers. Later in this chapter, as well as in certain of the succeeding chapters, we shall point out some of the constitutional problems arising from the exercise of these powers. But before taking up any of the specific powers we must devote some attention to that very significant principle in our government known as the separation of the powers.

SEPARATION OF THE POWERS.—A very important feature of the American constitutional system is the rule which provides for the separation of governmental powers among three departments—the legislative, the executive, and the judicial. This rule is based on three isolated parts of the Constitution. Section 1 of Article I states that “all *legislative* power herein granted shall be vested in a Congress of the United States”; Section 1 of



Article II provides that "the *executive* power shall be vested in a President," while a similar provision in Article III reads, "the *judicial* power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish." These provisions taken together have been interpreted to mean,—unless the Constitution provides otherwise—that each department is to perform *all* the duties which by their nature come within its scope and *only* such duties. These provisions might be restated more elaborately as follows: (1) The legislative department shall perform *only* legislative functions and no other department shall perform such functions; (2) The executive department shall perform *only* executive functions and no other department shall perform such functions; (3) The judicial department shall perform *only* judicial functions and no other department shall perform such functions; except, of course, in cases where the Constitution provides for the overlapping of functions.

It is very interesting to note that each state in the Union has incorporated these rules for the separation of powers into its state constitution. Here is a clear case of imitation, as there is nothing in our national Constitution which makes such a rule necessary in the several states. Perhaps there is no better example of the well-nigh unconscious movement toward uniformity among state governments than the general and voluntary adoption of this rule.

The theory of the separation of the powers was enthusiastically advanced by the framers of the Constitution as a guarantee against too much power in any one governmental agency. The suggestion of the theory was made by Montesquieu, a French writer, in his famous book, *The Spirit of the Laws*, which was widely read by members of the constitutional convention. In other

lands, including France, the matter of separation of powers is discussed merely as a theory, but it is more than a theory in the United States; it is a rule of constitutional law. It has been suggested by some writers that the rule was made a part of the Constitution not so much to avoid tyranny by any one governmental agency as to make the government less responsive to the popular will, and that the real reason of its insertion is to keep the Congress—the chosen representatives of the people—from encroaching too much upon personal and property rights.

But the framers of the Constitution recognized the impossibility, and even the absurdity, of a complete separation of the powers. So we find in the Constitution a number of exceptions. The chief executive has the power of vetoing legislation. The Senate ratifies appointments made by the President and approves treaties. The judiciary department has the power to declare null and void laws passed by Congress when in violation of the Constitution. The members of the judicial department are appointed by the President and the Senate. The legislative department appropriates the funds to be used by the three departments. These are illustrations of the many instances in which the Constitution deviates from the extreme theory of the separation of the powers.

In spite of the many exceptions, the rule still remains as a vital part of our constitutional law and any attempt on the part of any one of the three departments to exercise a function which by nature belongs to one of the others is unconstitutional. Furthermore, no department may voluntarily turn over any of its duties to any other department.

An important constitutional rule resulting from the separation of the powers is the one which prevents Congress from delegating legislative power. In England

Parliament may decide that, until otherwise provided for, a particular board or commission shall have complete legislative power over transportation, or public health, or any other important field of legislation. Not so with Congress. No other governmental agency may exercise legislative power. This restriction sometimes works as a disadvantage to efficient government, as legislation and administration of law are in reality two aspects of the same thing. There are times when it is highly desirable that a board be given complete authority over a certain field with power to make rules—that is, to legislate—to execute and administer these rules, and to apply the rules to individual cases—that is, to act as a tribunal or court. Such a combination would be unconstitutional in America under the rule for the separation of the powers.

In regulating railroads, for example, Congress passes the law; it is administered by the Interstate Commerce Commission, but no decision of the Interstate Commerce Commission is final until there is opportunity for a court hearing. If it were not for the rule for the separation of the powers the commission might, subject to any later action of Congress, be given complete and final jurisdiction over matters pertaining to interstate commerce. The same problem arises constantly in state government in connection with the many regulatory commissions which are a necessary part of a modern governmental system. An industrial commission may exercise only administrative functions. If it is given legislative power over labor questions it is an unconstitutional delegation of legislative power. If it is given power to decide cases it would be performing, unconstitutionally, a judicial function.

To be sure, the courts have been very reasonable in drawing the line between legislative and executive functions, and an administrative body is usually given fairly

broad powers in supplementing the general law laid down by the legislature. Congress may pass a law providing that railroad rates shall be reasonable, and leave to the Interstate Commerce Commission the power to determine what rates are reasonable. Thus the fixing of rates has been held by the courts to be an administrative rather than a legislative function. On the same basis, a state legislature may provide by law that in general all machines shall be equipped with such appliances as are necessary to safeguard the life and limb of the workman using them, and may provide further that the industrial commission shall prescribe in detail what appliances are necessary. The determination of details is an administrative function, and giving such power to a commission is not an unconstitutional delegation of legislative power.

The separation of the powers does *not* prevent the delegation of legislative power to local governments. Congress may delegate to the government of the District of Columbia, for example, power over local matters. A state legislature may, in spite of the separation of powers provided for in the state constitution, delegate legislative power to a city council or a country board. Historically, there has been such a long and steady development of local government that the delegation of legislative power to local governing bodies is held to be a very different matter from delegating legislative power to a tax commission or a labor board.

THE SEPARATION OF THE POWERS AND JUDICIAL FUNCTIONS.—We have seen that it is unconstitutional for an administrative or executive officer to exercise judicial power, and any law purporting to give an administrative body the right to hear cases as a court is unconstitutional. Here, again, the courts have been very reasonable in their interpretations. There are certain instances where

an administrative officer is given final jurisdiction over individual cases. An illustration of this is the power vested in the Secretary of Labor to decide whether an alien shall be admitted to this country. Such a decision has been held to be administrative rather than judicial. Here, as in the case of distinguishing between legislation and administration, it is almost impossible to draw a straight line. In general, however, any attempt to turn judicial functions over to an executive or to a legislative agency would be null and void.

On the other hand, any attempt to give nonjudicial functions to the courts would be unconstitutional. If, for instance, Congress should pass a law authorizing the Supreme Court to supervise the taking of the next census, such legislation would be held to be a violation of the rule for the separation of the powers. It has been held, however, that a court may be asked to grant permits for the incorporation of villages and towns, and that this is a judicial function.

There are certain rights and privileges which inhere in the courts which cannot be constitutionally taken away from them. Among them are the right to compel the attendance of witnesses and to punish those who show contempt of court. Conversely, to give these powers to nonjudicial officers would be unconstitutional. Neither can Congress interfere with a case while it is in progress, nor set aside any decision of a court as far as its effect on the parties directly involved is concerned.

**THE TAXING POWER OF THE FEDERAL GOVERNMENT.**—Under this head we shall take up briefly some of the constitutional questions that are involved in the federal taxing power, but we shall make no attempt at a comprehensive discussion of the means used in exercising this power. The government of the United States is



given express power to lay and collect taxes. There are, however, certain limitations upon this power.

UNIFORMITY OF TAXATION.—The Constitution provides that taxes shall be uniform throughout the United States. When, in 1898, Congress passed an inheritance tax law, a heavier tax was laid on the heirs who were more distantly related to the deceased than on the members of the immediate family. Furthermore, a heavier rate was charged on large legacies than on small ones. Do such distinctions violate the rule of uniformity? The court in the case of *Knowlton v. Moore*<sup>1</sup> said not. By uniformity, say the courts, is here meant geographical uniformity. That is, taxes must apply the same in California as in New York. For example, a law providing for a different rate of tax on goods entering the port of San Francisco than the port of New York would be unconstitutional.

DIRECT TAXES.—Direct taxes must be levied according to population says the Constitution. What are direct taxes as the term is used in the supreme law of the land? Please remember we are not engaged here in making the distinction which economists make between direct and indirect taxation. What we want to know is how the courts have interpreted the term "direct taxes." All such taxes must be apportioned among the states on the basis of population; all others may be levied without regard to state lines or state populations. Up to the present only a very few types of taxation are classified as direct. A poll tax, of course, would be direct and should properly be apportioned according to population. Taxes on land also are held to be direct taxes. Hence, it would be absurd, even though constitutional, for the United States to levy a tax on land, as the levy would have to be apportioned among the

<sup>1</sup> 178 U. S. 41.



several states, not on the basis of land, as it obviously should be, but on the basis of population. It is not absolutely clear whether a tax on personal property would be direct or indirect, although early in our history a tax on carriages was held to be indirect. A tax on the use and the sale of personal property or the manufacturing of goods would no doubt be considered indirect. In fact, the federal government repeatedly has levied a tax on sales. Taxes on the use and sale of property are classed as excises and are indirect taxes in the constitutional sense. Inheritance taxes have been held by the Supreme Court to be indirect and therefore need not be apportioned among the states according to population. A federal tax on state bank notes has also been classified by the courts as indirect.

What about income taxes? In 1880 the Supreme Court unanimously held that the income tax was indirect, but fifteen years later the court reversed its position and held that taxes on the income from real estate are direct taxes, as are also taxes on the income from personal property. This decision made it virtually impossible for the United States to levy an income tax, as no incomes from land or personal property could be taxed unless they were grotesquely apportioned among the states according to population. Eighteen years later, in 1913, the Sixteenth Amendment gave Congress the power to levy a tax on all incomes regardless of population, and as it now stands the question of whether an income tax is direct or indirect is of no constitutional importance.

**EXPORT TAXES.**—The Constitution specifically prohibits the levying of an export tax. This is the only positive prohibition against any particular form of federal tax. Because of this prohibition Congress may not even levy a tax on marine insurance on goods carried to foreign countries. But an exporter under the juris-

diction of the United States must pay an income tax in spite of the fact that his income is derived from his business as an exporter. Such a tax is not an export tax. Neither is it unconstitutional to levy a tax on the manufacture of goods even though they are intended for export, as long as there is no discrimination against the goods to be exported.

**TAXATION OF STATE AGENCIES.**—Because of the dual government under which we live there are certain peculiar implied restrictions on the taxing power. The federal government may not levy a tax on the instrumentalities, or agencies, of any of the states. In 1870 the Supreme Court was called upon to decide whether a federal income tax could be levied on the salary of a Massachusetts judge. Such a tax was held to be an unconstitutional interference with the sovereignty of the state,<sup>1</sup> and no state official need pay a federal income tax on his salary. Because of the same principle the United States cannot levy a tax on state bonds nor on the income from them. As cities and other municipalities are also agencies of the state, the federal government may levy no tax on municipal bonds nor on the income from them. Because of the effect of these exemptions on other securities it has been proposed to amend the Constitution so as to allow the levy of a federal tax on municipal bonds. The United States may, however, levy an inheritance tax on property inherited by a municipality, as this has been held not to be an undue interference with state agencies.<sup>2</sup>

The rule which prevents the federal government from taxing state agencies applies also in the other direction, with the result that no state may tax any instrumentality of the federal government. When Ohio levies a tax on real estate it must except all land and buildings

<sup>1</sup> *Collector v. Day*, 11 Wallace 113.

<sup>2</sup> *Snyder v. Bettman*, 190 U. S. 249.

owned by the United States even though they are located within the boundaries of the state. When Wisconsin levies an income tax it must except the salaries of all United States officials living within the state as well as the income from federal securities.

**DUE PROCESS.**—The Fifth Amendment prohibits Congress from taking life, liberty, or property without due process. If the government takes money through taxation it must meet the requirements of due process. What these requirements are will be discussed in Chapter X. The Fourteenth Amendment directs precisely the same prohibition against the states. Hence neither the federal government nor any of the states may take money under the taxing process except by methods which conform with due process. As the same principles relative to due process apply to the federal taxing power as to that of the states, they are discussed together in the chapter on taxation (Chapter X).

**HOW FAR MAY TAXATION BE USED FOR REGULATION.**—The federal government has extensive taxing power. What would happen if a law were passed which incidentally raises revenue but which in reality is intended to regulate? When Congress during the Civil War laid a heavy tax on state bank notes—so heavy a tax that state bank notes were prohibited—it was apparent that this was a tax measure only in appearance. In reality it amounted to a prohibition of state bank notes. The law was upheld in the case of *Veazie Bank v. Fenno*<sup>1</sup> on the ground that Congress had the right to regulate state bank notes under its express grant to provide a currency system. That is, a tax may be used for regulating those things which are already within the federal powers.

But whenever the federal government attempts to

<sup>1</sup> 8 Wallace 533.

regulate, under guise of taxation, in any field not within the federal powers, such a regulation is unconstitutional. In other words, Congress cannot use its taxing power to regulate matters which would otherwise be outside its control. If Congress should levy a heavy tax on all manufacturers not meeting certain federal regulations for the protection of the health of employees, it would clearly be an attempt to establish federal health inspection under guise of taxation. Perhaps federal health inspection would be a desirable thing, but we are discussing the constitutionality of such a procedure and not its wisdom.

It is often difficult to determine whether a law is primarily a tax law, or whether it is merely a subterfuge to permit regulation in fields which might not otherwise be invaded. In 1904 the Supreme Court had a difficult question before it in the case of *McCray v. United States*.<sup>1</sup> Congress had passed a law imposing a tax of ten cents a pound on all oleomargarine colored in imitation of butter. Is this a tax law, or is it in reality a regulation of the manufacture of oleomargarine—a subject over which the states and not the federal government have authority? If it is a revenue law it is valid, because Congress may levy excise taxes on the manufacture of goods. On the other hand, if it is in reality a regulatory measure it is unconstitutional. The court held that the law was a revenue act on the face of it and refused to go into the motives of Congress in passing the law. This decision indicated that Congress might go a long way in levying excise taxes. In 1919 Congress passed a law which levied a tax of 10 per cent on the net profits of any person or corporation employing child labor. What about such a law? Is it intended to raise revenue or is its purpose to regulate child labor—another subject over

<sup>1</sup>195 U. S. 27.

which federal power does not extend? In spite of the fact that many constitutional lawyers believed that the child-labor tax law was in the 'same class with the oleomargarine tax law, the Supreme Court held that the child-labor law was a case of regulation under cover of taxation, and therefore was invalid. In passing, attention might be called to the fact that this decision made the demands for a child-labor amendment to the Constitution more imperative. A few years before this, Congress had attempted to regulate child labor through its power over interstate commerce, but this had—in 1918—been declared an unconstitutional use of that power.<sup>1</sup>

The child-labor tax case *Bailey v. Drexel Furniture Co.*,<sup>2</sup> decided in 1922, was severely criticized as an unwarranted interference by the courts of the taxing power of Congress. However, if this tax had been upheld the door would have been opened still farther to federal regulation through taxation. Previous to this decision a number of laws had been passed on the strength of the oleomargarine case—one levying a heavy tax on the manufacture of poisonous matches, for example—and the court evidently realized that, unless this movement was checked, the federal government might encroach unduly on the regulatory powers of the states. The decision is noteworthy as leaning in the direction of the strict constructionists and as recognizing the doctrine of state rights. In these respects it stands out rather prominently in contrast with the general movement in the direction of liberal construction and of the expansion of the implied powers of Congress.

To summarize, we may make two statements relative to federal regulation under guise of taxation. (1) The

<sup>1</sup> *Hammer v. Dagenhart*, 247 U. S. 251.

<sup>2</sup> 259 U. S. 20.



taxing power may be used for regulation in matters under federal authority, but (2) it must *not* be used for regulating matters not within the scope of federal powers. Whether a given law is a tax law or a regulatory one is a difficult question and must ultimately be decided by the Supreme Court.

EFFECT OF THE SIXTEENTH AMENDMENT ON FEDERAL TAXING POWER.—The only effect of the income-tax amendment is to permit Congress to levy income taxes without apportionment among the states on basis of population. Otherwise it does not extend the taxing power of Congress beyond its previous bounds. For instance, the Constitution provides that the salary of a federal judge shall not be diminished during his term of office. This means that the government cannot decrease such a salary by levying an income tax upon it. The Sixteenth Amendment used the words "incomes, from whatever source derived." Does this invalidate the constitutional guarantee against the diminution of judicial salaries? The court said (*Evans v. Gore*, 253 U. S. 245) that it does not, and that the only effect of the amendment is to make apportionment of income taxes by population unnecessary.

FEDERAL FISCAL POWERS.—Congress is given the express power to coin money and to borrow money on the credit of the United States. The most important constitutional question arising out of this grant relates to the federal power over bills of credit—usually government notes in the form of paper money. When, in the case of *McCulloch v. Maryland*,<sup>1</sup> as in the implied power of the United States to establish a national bank was upheld, it was assumed that the establishment of such a bank would carry with it the issuance of government bank notes. This assumption has never been questioned and

<sup>1</sup> Wheaton 316.



the federal government regularly emits bills of credit under its implied power.

The states are prohibited from issuing bills of credit, but this has not been interpreted in such a way as to interfere with the right of the states to borrow money. Any state bills of credit circulating as money, however, are prohibited. State bank notes are state bills of credit and sometimes circulate as currency, although Congress may, under its power over currency, regulate or perhaps even prohibit their circulation.

The states are prohibited by the Constitution from making anything but gold and silver a legal tender in payment of debts. No such prohibition is directed against the federal government and Congress has regularly exercised the right to decide what shall be legal tender—that is, what may be legally offered to creditors in payment of debts. This power is properly implied from the express powers to coin and to borrow money. The states may also legislate as to legal tender, but may not, as noted above, make anything but gold and silver legal tender. In case of conflict between federal and state law as to what is legal tender the federal law holds.

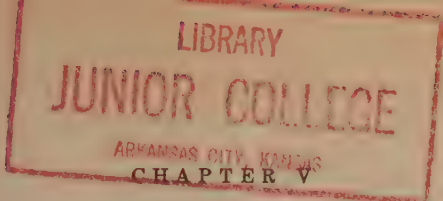
During the Civil War Congress passed a law making government notes legal tender. A creditor in Kentucky refused to receive such paper money in payment of a promissory note, and eventually the case came before the Supreme Court, which held by a vote of five to three (*Hepburn v. Griswold*, 8 Wallace 603) that this law was unconstitutional as far as debts contracted before the passage of the law were concerned. But this decision did not long remain. Only three years later the court reversed its decision when another series of legal tender cases came before it, and clearly stated that Congress has the power to make government notes legal tender.<sup>1</sup>

<sup>1</sup> Legal Tender Cases, 12 Wallace 457.

This decision was based partly on the fact that the legislation was passed during the Civil War and that great powers are necessary in such periods of emergency. Fourteen years later, however, in the case of *Juilliard v. Greenman*,<sup>1</sup> the courts upheld legal tender laws passed in times of peace and established definitely the principle that Congress has full authority to legislate regarding legal tender. In general it might be added that the control of the federal government over matters of currency is complete.

Two of the most important powers of the federal government—the regulation of interstate and foreign commerce, and the control of foreign relations—are fully discussed in later chapters. The subject of military affairs is discussed under foreign relations, although many aspects of the military are domestic rather than international in their nature. Many other federal powers, expressed and implied, concerning which but few constitutional questions have arisen, are not discussed in this volume. This omission is due to our desire to limit this book to constitutional questions rather than to describe the many details of our government.

<sup>1</sup> 110 U. S. 421.



## THE STATES AND THE TERRITORIES

**CONSTITUTIONAL PROVISIONS.**—There are two portions of the original constitution which deal directly with the states. The first is Section 10 of Article I, which is made up entirely of a catalogue of the things which the state must not do. The second is Article IV, which is devoted to the relationship between the federal government and the several states as well as to the relationship between the several states. Some of the amendments also include direct prohibitions to the states, and others, such as the slavery and prohibition amendments, limit both federal and state action.

The provisions of the Constitution relating particularly to the states may be grouped under seven heads: (1) absolute prohibitions against the states, (2) things which the states are forbidden to do without the consent of Congress, (3) obligations of the states to one another, (4) guarantee of a republican form of government, (5) protection against invasion and domestic violence, (6) admission of new states, and, (7) the government of territories.

**ABSOLUTE PROHIBITIONS AGAINST THE STATES.**—Many of these prohibitions are of great significance in American constitutional law. One of these—the provision that no state shall pass any law impairing the obligations of contract—has given rise to so many constitutional questions that an entire chapter of this volume is devoted to its discussion. A still more important limitation upon the powers of the states is that found in the Fourteenth

Amendment, which provides that no state shall "deprive any person of life, liberty, or property without due process." This clause has been the cause of more constitutional problems than any other part of the constitution. No doubt more cases have come to the Supreme Court involving the interpretation of this clause than any other group of words in the entire document. Because of its outstanding importance the due process clause is discussed in its various aspects under several later chapters, and we shall give no further attention to it at this point. It should be borne in mind, of course, that the requirement for due process is also directed toward the federal government by the Fifth Amendment.

The prohibition against emitting bills of credit and against making anything except gold and silver legal tender was discussed briefly in the preceding chapter. These clauses have had comparatively little attention from the courts. Neither has the denial of the right to coin money given rise to any important constitutional problems.

Very properly the states are absolutely prohibited from entering into "any treaty, alliance, or confederation" or to "grant letters of marque and reprisal." These provisions are so obvious and so clearly justified that the problems arising from them are not of great moment. This does not mean, of course, that the provisions themselves lack importance. The complete control of foreign affairs by the central government is not only desirable, but absolutely necessary, and the wisdom of prohibiting the individual states from participating directly in foreign affairs has never been questioned. Another limitation upon the states which likewise has caused no vexation to students of constitutional law is that which prohibits the granting of letters of nobility.

Of a different nature are the prohibitions against bills

of attainder and *ex post facto* laws. The interpretation of these phrases has received the attention of the court in many cases. These interpretations are taken up in Chapter VIII, as they properly belong under the discussion of personal rights and their safeguarding. Here, too, it should be remembered that the federal government also is prohibited from passing any bill of attainder or *ex post facto* law. The interpretation of the word "slavery" in the Thirteenth Amendment has thrown light on certain types of economic conditions which are akin to slavery. These matters also properly belong in the chapter on personal rights.

By the provisions of the Fifteenth Amendment the states as well as the United States are prohibited from denying any one the right to vote because of race or color. The woman-suffrage amendment prohibits discrimination as to voting on the basis of sex. Both of these amendments are invasions of the power of the state over suffrage—a power which outside of these restrictions is most extensive. The whole matter of suffrage will be given further attention in Chapter XIII.

THINGS FORBIDDEN TO THE STATES EXCEPT WITH THE CONSENT OF CONGRESS.—While the complete control of foreign affairs is centered in the federal government, it is possible under the Constitution for the states, after getting the consent of Congress, to levy an import or export tax. As a matter of history no state has ever been given this privilege, and even though it were granted and the tax were levied, the proceeds of the tax would go to the federal government. It is doubtful whether any state would be interested in this privilege. The terms "import and export" as used in this connection in the Constitution have been interpreted by the courts to mean only goods imported from or exported to foreign countries and do not refer to goods shipped



from one state to another. A state may, however, levy a tax on imports or exports sufficient to bear inspection costs, and such action may be without the consent of Congress. Many states provide for the sanitary inspection of imports. Such inspection must bear a reasonable relation to public welfare and must not unduly interfere with interstate or foreign commerce. The importer may be compelled to pay a sufficient amount to cover inspection charges, but not more than this. Many states require the inspection of certain exports. Such requirement cannot prevent the shipment of goods out of the state, but is merely a process by which the outgoing products of the state are graded and branded. Maryland requires all tobacco intended for export to be brought to a state warehouse to be inspected and branded and charges the cost of inspection to the exporter. This procedure is entirely constitutional. The purpose of such a procedure, of course, is to establish a reputation in foreign markets for the products of the state by the use of a government stamp certifying that certain standards have been met.

Clause 3, Section 10, Article I of the Constitution provides that "No state shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war unless actually invaded, or in such imminent danger as will not admit of delay." The consent of Congress has seldom if ever been given except in the matter of agreement between states, and here the consent may sometimes be inferred by circumstances, even though it is not expressly given. Of interest to constitutional lawyers is how much the state may still do without asking the consent of Congress.

There are ways, of course, in which charges on vessels



may be levied which are not classed as tonnage taxes. If a state or one of its subdivisions, such as a city, makes a wharfage charge for use of its docks and wharves, this is not a tonnage tax, even though the charge is made on the basis of the tonnage of the vessel. A state may also prescribe pay for pilot fees and may require an inspection fee of all vessels entering its ports. The object of this prohibition against tonnage duties, of course, is to insure freedom of commerce from burdens imposed by the states, and any tax on the tonnage of ships as tonnage for the purpose of raising revenue cannot be levied without the consent of Congress.

**OBLIGATIONS OF THE STATES TO ONE ANOTHER.**—The first two sections of Article IV of the Constitution read as follows: "Section 1. Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other state, and the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved and the effect thereof.

"Section 2. The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

"A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime." Then follows a section concerning the return of fugitive slaves which has now no legal importance.

**FULL FAITH AND CREDIT.**—By the provisions of Section I each state must recognize the public acts, records, and judicial proceedings of other states. It does not follow, however, that the acts, records, and judgments of other states are in force in a state for all purposes, but

rather that they should be accepted as valid evidence. For example, a law passed in Ohio does not become operative in New York, but titles to land in Ohio under Ohio laws must be recognized as property of a party to a suit in a New York court. By "public acts" is meant the statutes and ordinances in force in a state, and by "records" is meant all the files of public officials registering deeds, births, marriages, and so forth, as well as legislative and judicial records.

The full faith and credit which must be given to judicial proceedings in another state applies only to civil suits and does not apply to criminal judgments. When the laws of the states are not in harmony, it is, of course, the law of the state in which the action is taken which controls, assuming that each state is acting within its constitutional authority. In many instances, such as in certain types of divorce cases, for example, a state may not be required to give full faith and credit to proceedings in other states. Oftentimes under such circumstances the state may give full faith and credit by comity, and such courtesies are frequently reciprocative. Questions like these come under that complicated and confusing, but fascinating, subject known to lawyers as the "conflict of laws."

The question of how far a state must give full faith and credit to divorces granted in another state is a complicated one. As the federal government has no power, expressed or implied, to regulate marriage and divorce, each state has complete authority over the status of persons within its jurisdiction, and it does not necessarily follow that because a divorce has been granted in one state, other states may not recognize the couple in the case as still legally married. Unless the full faith the credit clause applies to divorce proceedings, the state need not recognize dissolutions of the marriage granted

by other states. To go into detail as to when divorces in other states must be given full faith and credit is not our task here. For our purpose it will suffice to note that a state is required to recognize letters of divorce from other states in three cases: (1) When both plaintiff and defendant are residents of the state in which the divorce is granted; hence, if Ohio grants a divorce to a couple, both of whom reside in the state, all other states must recognize the judgment. (2) When the defendant is not a resident of the state where the plaintiff lives, but is given notice while in the state or voluntarily appears. Thus if the plaintiff lives in Ohio and the defendant living in another state is found in Ohio so that notice may be served upon him (or her), or voluntarily appears in the Ohio courts, the divorce if granted must be recognized by all states. (3) Even though the defendant is living outside the state and does not come within the state so that notice may be served, and does not voluntarily appear in court, the state may grant a divorce on the basis of having jurisdiction over the "last matrimonial domicile" of the couple. In the case of *Atherton v. Atherton* (181 U. S. 155) the Supreme Court held that a divorce granted to a man in Kentucky, even though his wife had left the state, must be recognized by other states, due to the fact that their "last matrimonial domicile" had been in Kentucky. In this case the wife had actually brought divorce proceedings against the Kentucky party in the New York courts, but the Supreme Court insisted that the previous divorce granted in Kentucky was entitled to full faith and credit in New York. If, in this case, the plaintiff had also left Kentucky and had established a residence in Ohio, for example, and then had instituted the original divorce proceedings, it would have been necessary to serve papers on the defendant's wife in Ohio or show that she had voluntarily

appeared in the Ohio court before the divorce would be entitled to full faith and credit in other states. That is, it would then come under the second type of cases here listed. It should be distinctly remembered, however, that while these are the circumstances under which a state is compelled under the full faith and credit clause to recognize divorces from other states, it is a common practice in a large number of states as a matter of interstate comity to recognize any divorce granted in other states. A few states still refuse to give this general recognition to all divorces granted in other jurisdictions.

INTERSTATE PRIVILEGES AND IMMUNITIES.—While it is true that our forty-eight states all enjoy great residual power, and while it is also true that a state line marks the distinct boundary between jurisdictions, it is nevertheless an obvious fact that passage from one state to another involves under ordinary circumstances no change in the rights and privileges of the person or persons going from one state into another. The federal power over interstate commerce and postal matters accounts very largely for the insignificance of state boundaries as an impediment to interstate travel and communication. The status of a person going into another state is further stabilized by the clause, quoted above, which guarantees citizens of each state the “privileges and immunities of citizens in the several states.”

This clause raises the question as to what is meant by a citizen of a state. The whole matter of state citizenship as related to federal citizenship is discussed in a later chapter. For the present we may say in an elementary manner, but correctly, that a citizen of a state is merely a citizen of the United States whose legal residence is in the state. Thus, all citizens of the United States legally residing in Ohio are citizens of Ohio. Under this clause

an Ohio resident, when he goes into Indiana, for example, is entitled to the same privileges and the same immunities which the latter state grants to her own citizens. If Indiana should levy a higher tax on nonresidents selling goods in that state than on Indiana citizens, such a levy would violate this provision. Neither can any state discriminate against citizens of other states in the matter of owning property or receiving inheritances. A citizen of another state must be given access to the courts of the state whenever his interests demand it. No complete enumeration of the privileges and immunities, to the enjoyment of which a citizen of another state is entitled, has been made, but the foregoing are illustrations of the types of discriminations which are invalid. In general it might be said that the fundamental rights of life, liberty, and property are to be enjoyed by nonresidents as well as by residents.

PUBLIC OR POLITICAL PRIVILEGES AND IMMUNITIES.—When we think of residents and nonresidents there immediately come to mind certain distinctions which, on the surface at least, appear to be discriminations against citizens of other states. There are certain things which Indiana may constitutionally prevent an Ohio citizen from doing in Indiana. One of these is voting. If Mr. A of Ohio goes to Indianapolis he finds that he may buy and sell goods, make contracts, own real estate, marry, inherit property, and so forth in exactly the same way as may Indiana citizens, but, very properly, he may not vote, or at least he must establish a residence for a certain period before he is a voter. He may buy real estate the moment he arrives, but in order to vote he must become an Indiana resident. Neither may the Ohio man hold public office in Indiana. These are what might be called political privileges. The clause guaranteeing interstate privileges and immunities might be said to ap-



ply to *private* privileges and immunities rather than to *public* or *political* ones. There are certain intimate relationships between the state and its citizens which need not be shared by nonresidents. The clause as interpreted then would read somewhat as follows: "The citizens of each state shall be entitled to all private privileges and immunities of citizens in the several states, but no state is compelled to grant *public* or *political* privileges and immunities to nonresidents."

Even this distinction does not solve all the problems, for there are a number of privileges and immunities which are difficult to classify, and *public* privileges and immunities have a wider scope than many people realize. A state may charge nonresidents a higher rate of tuition in a state school than residents are charged. This discrimination is a valid one because here the state is exercising authority over things which it has in a proprietary capacity. A state may, for example, charge an admission fee of all nonresident tourists who wish to inspect its public buildings while admitting residents without charge. Of course, no nonresident could be prevented from access to the courts or public offices which he might want to visit in order to enjoy his civil rights. Hence, in a very large sense we may say that the right to use the property of the state is a public or political privilege and the state may deny such rights to nonresidents. The state owns game and fish in a proprietary capacity, and so a nonresident may be compelled to pay a higher fee for a hunting or a fishing license than a resident. New Jersey passed a law which prevented nonresidents from fishing in the oyster beds of the state and this was upheld as a valid discrimination. A state may perhaps legally ask nonresidents to pay a higher automobile license fee than residents because of the proprietary interest in the public roads.



The meaning of public privileges is stretched in another direction also so as to cover the right to practice certain professions or engage in certain occupations the nature of which are such as to make it desirable to bring those who wish to engage in them under the scrutiny of the state for a definite period before the permit is granted. A state may require a period of residence in the state before it grants licenses to practice medicine or dentistry, and lawyers are frequently compelled to be citizens of the state in which they regularly practice. Not all occupations come under this head. A law requiring barbers to be citizens of the state would probably be held invalid by the courts because this occupation is not so closely allied with public interests as is medicine or law. The theory is that a state has a right to take time to observe the moral character of a person who desires to enter an occupation so fraught with importance to the general public. An unreasonably long waiting period for applicants coming from other states would no doubt be held invalid as a denial of interstate privileges and immunities.

The guarantee of interstate privileges and immunities does not mean that a person can carry with him into another state the privileges and immunities which he enjoys in his own state. If Ohio, for example, has no law prohibiting the manufacture of cigarettes and an Ohio citizen should go into a state where such manufacture is forbidden, he would have no constitutional right to claim that his privileges in Ohio are carried over into the other state. All that he can insist on is that he be given the same treatment as the citizens of the state into which he goes.

A corporation is not a citizen of a state, and any state may pass laws discriminating against corporations from other states without fear of violating the interstate

privileges and immunities clause. It may prevent outside corporations from entering the state, or if it does permit their entrance it may do so on whatever conditions which it wishes to impose. It must be remembered, of course, that no state may interfere with interstate commerce, and outside corporations cannot be prevented from shipping goods into the state or engage in any form of interstate commerce. Neither can a state prevent a corporation engaged in erecting buildings from entering the state if it is under contract to do construction work for the federal government. If, however, an outside corporation wishes to engage in any activity in the state which may not properly be classed as interstate commerce, or if it is not performing functions for the federal government, the state may exclude it entirely or impose conditions much more exacting than those imposed on corporations chartered by the state. For example, insurance has been held by the courts not to be interstate commerce, and as a result of this decision an outside insurance company may enter a state only on such conditions as the state may impose and may, if the state so desires, be placed at a disadvantage as against local insurance companies.

INTERSTATE EXTRADITION OF FUGITIVES.—The constitutional provision for the return of fugitives from another state is further recognition by the framers of the Constitution of the near-sovereignty of the states. One state has no authority to send its officials to make arrests within the boundaries of another. The same rule holds in international law, and no nation has any authority to make arrests on foreign soil. In international affairs the extradition of fugitives from justice is taken care of by treaties, and no country needs to give up fugitives from a foreign country except according to treaty pro-

visions. The international extradition of persons accused of crime will be taken up in Chapter XIV.

If Mr. A commits a crime in Cincinnati and flees to Indianapolis, he cannot be legally returned to Ohio until the governor of Indiana consents to such return. The Cincinnati police communicate with the governor of Ohio, who sends a requisition to the governor of Indiana for the return of A. This does not mean that Mr. A is necessarily at large during the process. If he were, he would probably be outside of the state of Indiana by the time that the requisition is honored by the governor of that state. Mr. A may be arrested by the officers of Indiana as a part of interstate comity or courtesy, and may be held pending his return to Ohio. The Indianapolis police officers are ready and willing to make the arrest because they may want a return favor from the Cincinnati police at any time. As a rule no requisition is made until the fugitive is actually under arrest. But Mr. A, while he may be detained in Indiana, cannot be legally returned to Ohio without the consent of Indiana. Congress has provided that it shall be the duty of the governor of the state in which the fugitive is found to turn him over, on the request of the governor of the state in which he is charged with crime, to the officials of the latter state, so that he may be brought back for trial.

What happens if a governor refuses to turn over a fugitive? Can a writ of mandamus<sup>1</sup> be issued compelling the governor to turn him over to the demanding state? In 1860 the governor of Ohio refused to surrender a fugitive from Kentucky, and the case was brought before the Supreme Court, which refused to compel Ohio to

<sup>1</sup> A writ of mandamus is a court order directing an officer to perform a duty required of him by law, but applies only to such duties as are merely ministerial and does not apply to duties which the official may perform at his discretion.

return the accused person.<sup>1</sup> When the governor is asked to return a fugitive he may, or may not, grant the requisition. Here, by the way, is a good illustration of an interpretation of the word "shall" to mean "may." The Constitution and the federal statutes both use the word shall, but the Supreme Court in the case just cited held that the duty of the governor is merely a moral one. Since 1860 there have been many instances of the refusal of interstate rendition of criminals by governors of states in which fugitives have been located. The law and practice which allow the governor this discretion are a sign of the survival of state rights. The governor in deciding as to the delivery of a person to the authorities of another state does not decide as to his guilt or innocence, but rather as to whether he is reasonably accused and as to whether he actually was within the boundaries of the demanding state when the crime was committed. In any case the governor may use his discretion.

The federal courts cannot compel a governor to give up a fugitive, but they may, on the other hand, by the use of the writ of habeas corpus, prevent a man's arrest and return even after such action is sanctioned by the governor. The state courts also may release him from the hands of the governor by a writ of habeas corpus. What this amounts to is that a person placed under arrest as a fugitive from another state has practically the same privileges, as to habeas corpus, as though he were arrested within the state where he is charged with a crime.

A person is a fugitive from justice within the meaning of this clause even though he left the territory of the state in which he is accused with no intention of fleeing from justice. If a person was within the territory of the demanding state when the crime was committed, later

<sup>1</sup> *Kentucky v. Dennison*, 24 Howard 66.

left that state and is later found in another state, he may be considered a fugitive from justice.

Sometimes the fugitive may be brought back into the state in which he is accused of crime by illegal means, such as kidnapping. It does not matter, as far as his liability to stand trial is concerned, even though he is brought back forcibly and illegally. He may, to be sure, bring charges of kidnapping against his captors, but this charge would have to be brought in the other state where the kidnapping actually occurred, and it would no doubt be difficult to secure extradition papers for the kidnappers, because the state in which they are now found has already been refused papers for the original fugitive who has since been forcibly and illegally returned. Nearly forty years ago this question was before the courts when a man named Mahon, who was accused of murder in Kentucky, fled into West Virginia. He was captured by a group of persons who had chased him into the latter state and was forcibly taken back to Kentucky and jailed. The Supreme Court, when the question was brought before it,<sup>1</sup> held that the federal government had no authority to interfere with Mahon's trial in Kentucky, even though his return to Kentucky from West Virginia had been illegal. His remedy would be to prosecute his captors for kidnapping under the laws of West Virginia, but West Virginia could try the kidnappers only if Kentucky consented to their extradition. Strange as it may seem, then, a fugitive in another state may be forcibly taken across a state line and find himself without any effective form of redress. This phase of the law is in a sense a movement away from state rights, for it detracts from the significance of an interstate boundary.

If A forges a signature in Cincinnati, is arrested in

<sup>1</sup> Mahon v. Justice, 127 U. S. 700.



Indianapolis, and is delivered up by the governor of Indiana to the Ohio authorities, he may not only be tried in Ohio for forgery, but on any other charge or for any other alleged criminal act. That is, the person extradited may be tried not only for the crime for which extradition was demanded, but for any other as well. This is an entirely different rule from the one which holds in international law. A fugitive extradited from one country to another can be tried only for the crime for which extradition was asked. This rule may, of course, be modified by treaty.

The word "crime" as used in this clause of the Constitution includes every act which is in violation of a law of a state and covers crimes of a minor nature and misdemeanors.

No state has any authority to deliver fugitives to the authorities of a foreign country. If a fugitive from Canada is found in Ohio it is a matter entirely for the federal government. This is so because all control of foreign relations is vested in the central government. According to the same principle, no state may ask a foreign power to extradite a fugitive from justice. If A, accused of a crime in Ohio, is arrested in Canada, the state of Ohio must ask the United States to take up the matter with her northern neighbor.

**GUARANTEE OF A REPUBLICAN FORM OF GOVERNMENT.**—Section 4 of Article IV of the Constitution reads as follows, "The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence."

In the foregoing sentence is found the only constitutional provision which gives any federal control over the



internal governmental organization of the states, and this control is very small indeed. By a republican form of government we usually understand one in which the people govern themselves through their chosen representatives. The Supreme Court has always refused to make any interpretation of this phrase. It has consistently held that the question as to what is a republican form of government is a political and not a judicial one, and that Congress is the proper agent to carry the guarantee into effect. Congress may empower the President at his discretion to make decisions as to whether a state government is republican in form. No doubt if any state should attempt to establish a permanent military government or should allow the establishment of an unlimited monarchy, Congress would enact legislation prescribing what features of such a government should be changed, and the Supreme Court would of course back up such action by refusing to hold such legislation unconstitutional. Congress might refuse to give seats in Congress to representatives elected under a state government which it did not consider republican in form.

The question has been raised as to whether the initiative and referendum are permissible under a republican form of government. These devices, of course, lessen the powers of the state legislature by giving the people themselves more direct control. Whenever the validity of the initiative and referendum has been attacked as an unconstitutional departure from the republican form, the court has, as above indicated, refused to make any interpretation, but has said that Congress has the power to preserve the republican character of the state governments. Up to the present, Congress has taken no action relative to the initiative and referendum and in all probability it will never legislate against such direct popular lawmaking. A government might be socialistic in its

nature and still be republican; or it might be a monarchy in outward form and still be republican, as is the case in many European countries where there is in reality popular government in spite of theoretical powers of a royal monarch. It is conceivable that one state might adopt the Russian soviet form of government and another the British system, and both be within the scope of the term "republican." Nevertheless, it would be Congress which would have the final word in the matter. Except during the Reconstruction period following the Civil War when Congress interfered a great deal with the governments in the Southern states, there has been practically no federal legislation directing the internal organization of state governments.

Closely allied to the guarantee of a republican form of government is the power of Congress to decide between two opposing state governments, each claiming to be the real one. The best known instance of two contending state governments is the situation resulting in Rhode Island from the Dorr Rebellion. A new government was established without following the amending process outlined in the state constitution, and Dorr was elected governor. Meanwhile the old government continued, and a man named Borden, acting for this government, broke into the house of a man named Luther, who was engaged in organizing the new government. Luther sued Borden for trespassing, but Borden justified the trespass on the grounds that he was acting for the state of Rhode Island. Luther contended that the old government was no longer the real government of the state and that therefore Borden was acting without authority. When the matter came before the Supreme Court in the famous case of *Luther v. Borden*<sup>1</sup> the question of which of the two rival governments was the real one was

<sup>1</sup> 7 Howard 1.

held to be political. Already the President, under authority given him by law, had recognized the legality of the old government by giving it military support, and this, of course, was likewise a political question. As a matter of historical interest it might be added that the new government was later recognized by the federal authorities.

**PROTECTION AGAINST INVASION AND DOMESTIC VIOLENCE.**—There are always two sources from which interference with law and order may come; one is from outside aggression, or foreign invasion; the other is from domestic violence. It is obviously the duty of the federal government to protect each state against invasion, and the United States has full power to take any steps it deems wise against any foreign aggression, actual or threatened. The state may also use its own local forces when actually invaded or in imminent danger of it, but it is the federal government which has the ultimate and complete responsibility for repelling invasion.

When it comes to matters of domestic violence, the situation is not quite the same. The maintenance of law and order locally is primarily the function of the several states, and in cases of mobs or local insurrection the President must wait until a request for help comes from the state legislature, or from the governor if the legislature is not in session. The President, however, need not send military assistance to the state government even when it is asked for unless in his discretion it seems wise. Thus, President Harding in 1921 refused for some time to give aid to West Virginia in settling strike disturbances after the state had officially asked for assistance.

While it is true, in general, that the President must not send federal aid to put down domestic violence unless the state asks for help, it must also be remembered that

the President has authority to use force to execute the laws of Congress and to keep all federal machinery in motion. Hence, whenever any domestic violence, even though it be local in nature, interferes with the enforcement of federal law or the administration of federal activities, the President may send federal troops into the state without an invitation from the state government and may do so even over the objections of state authorities. If the local disturbances interfere with the passage of the United States mail, for example, the President may use military force to keep it going regardless of the attitude of state officials. The most notable illustration of this power of the President was the action of Cleveland in 1893, when, on the plea that federal machinery of government was menaced, he dispatched federal troops to the scene of the Chicago railroad strike in spite of remonstrances on the part of the governor of Illinois. Nevertheless, unless federal laws are broken or federal functions interfered with, the President is powerless in domestic insurrections unless the state asks for help, and this helplessness on the part of the President is another indication of considerable state sovereignty.

ADMISSION OF NEW STATES.—The Constitution gives Congress the power to admit new states into the Union. The only limitation upon this power is that no part of the territory of a state already in the Union shall be taken without its consent in making up the new states. The Constitution is silent as to the details for admitting states and Congress may follow any procedure it sees fit. Ordinarily, when the people in a territory petition for admission Congress passes an enabling Act authorizing the people in the territory to frame a constitution. After this instrument has been adopted by the people, Congress passes an Act formally admitting the territory to statehood.

Thirty-five states have been admitted into the Union since the adoption of the Constitution by the original thirteen, and each of these thirty-five are on an equal footing with each of the original states and with one another. Congress may, to be sure, refuse to admit a state into the Union or delay the admission, but, once it is in, it has the same status as every other state. Congress has admitted some of the states on certain conditions, and an interesting question arises as to whether, from a legal standpoint, these conditions need be fulfilled by the state after its admission. The states are all equal and each enjoys residual power, and it seems clear that any condition of a political nature imposed upon a state before admission would have no binding force after the state is once in the Union. Because President Taft objected to the recall of judges, Arizona in 1912 was admitted on condition that the provision for the recall of judges be stricken from the constitution which had been adopted by the people of the territory as its fundamental law. Arizona changed her constitution and was admitted to the Union. In less than a year, however, the people of Arizona amended the constitution so as to again provide for the recall of judges. Various states have, from time to time, been admitted on conditions which the respective states have looked upon as being at least morally binding, and as a result the conditions have been voluntarily fulfilled. Utah was admitted on condition that polygamy be abolished and has made no attempt to reestablish the practice. If she did, it would no doubt be entirely within her legal powers so to do, for the regulation of marriage is one of the residual powers of the states.

A distinction must be made, however, between political conditions imposed upon states and agreements regarding property rights which the incoming state may make



with the national government. Many states have been admitted with the agreement that public lands sold by the United States should be exempt from taxation for a term of years. Such an agreement is not political in its nature and does not involve the question of the equality of the states, and a state is legally bound to live up to such a compact. To summarize—Congress has complete power over the admission of states and may impose such conditions as it sees fit upon entrance into the Union. As soon as a state is admitted, however, it may ignore any condition which interferes with the exercise of its residual political power. Agreements regarding proprietary rights between a territory and the United States must be fulfilled after admission.

When a territory becomes a state it means that Congress loses most of the legislative authority which it may exercise over territories. For example, before 1802 Congress had complete legislative authority over the area now within the boundaries of the state of Ohio. It could regulate all details of human conduct; but the moment Ohio became a state much of the power automatically passed from Congress to the state legislature. If Congress in our early history had so desired, the thirteen colonies might have governed the rest of the area of the United States as territories and refused to admit any new states. Many forces, such as the slavery issue and the desire of the residents of the territories for statehood, contributed, of course, to the movement for increasing the number of states. When we think, however, of these two propositions, namely (1) a territory can become a state only when Congress wishes, and (2) when a territory becomes a state Congress loses much of its authority over it, it seems marvelous that statehood should have been granted so freely and willingly. If nothing else, it indicates that the American Congress has



shown no desire to take advantage of a situation which might have led to a marked increase in its power. Here is one instance where Congress is not limited by the Constitution and yet has shown no inclination to be oppressive or tyrannical.

THE GOVERNMENT OF TERRITORIES.—All territory under the jurisdiction of the United States which is not included in any of the states is under the control of Congress. Congress may exercise the control directly, as it frequently does in the case of the District of Columbia; or it may establish a territorial legislature to make local laws. Territorial legislatures are now found in Alaska, Hawaii, Porto Rico, and the Philippine Islands. The territorial legislature is in a very different situation from the legislature of a state. The latter has residual and inherent power, while the former has only such power as Congress has given to it. Furthermore, Congress may at any time revoke any grant of legislative power given to the territorial legislature.

ANNEXATION OF TERRITORY.—Nowhere in the Constitution is there any mention of acquiring or annexing territory. But the power of acquisition or annexation has properly been implied by the express power to make treaties and by the war power. If the federal government has treaty-making power it is perfectly fair to infer that it could make a treaty with France for the cession of Louisiana. If it has power to carry on war it is also fair to infer that it may at the close of a war take over conquered territory, as we did following the war with Mexico and later following the war with Spain. Conquered territory may be taken over by treaty at the conclusion of a war. It is now a settled principle that the United States may acquire territory, but when the question first came up in connection with the purchase of Louisiana in 1803 it perplexed Jefferson—strict con-

structionist that he was—and grave doubts were entertained as to the propriety and constitutionality of the annexation of territory.

When does conquered territory come under the jurisdiction of the United States so that all laws apply? Is it when it is occupied by our troops? Or must more formal action be taken? And if so what particular form of action is necessary? These questions have not been answered by our courts with complete clarity, but for our purposes we may state the situation as follows. Territory occupied temporarily is not subject to the laws of the United States unless Congress specifically so prescribes. When a territory is permanently made a part of the United States the laws of the United States may be extended to it in two different ways: (1) by congressional action or (2) by treaty. Statutes and treaties are both supreme law. Hence, either one may be repealed by the other. When Porto Rico was annexed, the question arose whether the existing tariff laws of the United States applied to it as soon as the treaty annexing the island was promulgated. Had Congress in passing revenue laws intended that they should be extended to any territory later acquired? The Supreme Court by a vote of five to four held that the treaty of annexation *ipso facto* made all revenue laws applicable to Porto Rico.<sup>1</sup> This decision has been criticized on the ground that it seems unwise to apply all laws indiscriminately to acquired territory. Congress, however, may at its discretion exempt territories from certain types of laws. In the case of conquered territory the President, as commander-in-chief of the army and navy, has complete charge until Congress makes provision for its government.

<sup>1</sup> De Lima v. Bidwell, 182 U. S. 1.

HOW FAR DOES THE CONSTITUTION APPLY TO TERRITORIES?—By far the most important constitutional question in connection with the territories is how far constitutional provisions, especially the guarantees of personal rights, apply to the territories. In a few provisions, but in only a few, the language makes it clear that they apply only to the states. An example of this is the statement that “no tax or duty shall be had on articles exported from any state.” Such a limitation does not permit Congress from taxing exports from Porto Rico.

POWER OF CONGRESS OVER TERRITORIAL COURTS.—The Constitution provides that all federal judges shall hold office for life (“during good behavior”). At the same time Congress is given the power to legislate for the territories. Suppose Congress should provide for territorial courts with judges appointed for a short term of years instead of during good behavior. Would such short terms be valid in spite of the constitutional provisions for life appointments to the federal bench? It has been held that the judiciary article does not apply to the territories and that Congress need not follow its provisions in organizing territorial courts. These courts derive their power from the right of Congress to govern the territories and not from the judiciary article of the Constitution.<sup>1</sup>

PROVISIONS EXPRESSLY APPLICABLE TO ALL TERRITORIES.—There are two parts of the Constitution which clearly and expressly apply to all territories under the American flag. One of these is the Thirteenth Amendment, which states that “Neither slavery nor involuntary servitude . . . shall exist within the United States *or any place subject to their jurisdiction.*” It is interesting to note that such a wide application is not expressed in

<sup>1</sup> American Insurance Co. v. Canter, 1 Peters 511.

the Fourteenth or the Fifteenth Amendment, both of which were drafted by the same group of persons and at about the same time. Possibly it was realized that certain areas might later be made a part of the United States to which the Constitution in general would not apply, and in order to make slavery forever illegal under the American flag it was expressly prohibited not only in the United States, but in any place subject to its jurisdiction.

In one other place a similar phrase is used. The Eighteenth Amendment prohibits the manufacture, sale, transportation, importation, and exportation of intoxicating liquor and makes the prohibition apply to "the United States *and all territory subject to the jurisdiction thereof!*"

These are the only parts of the Constitution which expressly apply to the territories, and legalization of slavery or of the liquor traffic in any of the territories would be unconstitutional. Thus we see that a few provisions of the Constitution apply only to the states and that two others expressly apply not only to the states, but to all territories as well. Most of the Constitution is silent as to whether or not it should be extended to the territories.

OTHER PROVISIONS APPLYING TO TERRITORIES.—Are the prohibitions as to slavery and the liquor traffic the only limitations upon congressional power over the territories? May Congress in regulating territorial affairs outside of slavery and the liquor traffic ignore the constitutional limitations and guarantees which apply to the states? Or do the guarantees of personal rights, found principally in the first nine amendments, protect the inhabitants of the territories as well as the inhabitants of the states against extreme Congressional interference. These are questions which have perplexed constitutional

lawyers and have puzzled even the judges of the Supreme Court. It is generally agreed that the express prohibitions against slavery and the liquor traffic are *not* the only ones applying to the territories. Other parts of the Constitution are naturally implied as extending to the territories, even though no such extension is expressly made by the language of the Constitution. We may very properly imply such extensions. Up to the time when our island possessions were annexed the problem was comparatively simple. It was assumed that the Constitution, except such clauses as clearly and expressly applied only to the admitted states, applied to all territories. But when we found ourselves in possession of islands populated by a race with a different culture and a different political and historical background from our own, the question of constitutional guarantees in such territories assumed great importance. Congress in 1902 provided for the trial of Filipinos without a jury. This in spite of the fact that the Constitution guarantees a jury trial for a person on trial for violating the criminal laws of Congress. The Supreme Court in 1904 held<sup>1</sup> that the right of trial by jury is not a fundamental right and is not guaranteed to inhabitants in those territories not incorporated into the United States. Just a year before, the Supreme Court had held that Hawaiians were not guaranteed a jury trial.<sup>2</sup> In 1905, however, the court held that the guarantee of a jury trial extended to Alaska,<sup>3</sup> as this is an incorporated territory.

The situation in regard to the constitutional guarantees in the territories might be summarized as follows:

First, in those territories whose inhabitants are for the most part of American antecedents, culturally and

<sup>1</sup> *Dorr v. U. S.*, 195, U. S. 138.

<sup>2</sup> *Hawaii v. Mankichi*, 190 U. S. 197.

<sup>3</sup> *Rasmussen v. U. S.*, 197 U. S. 516.



racially, all guarantees apply in the same way as they apply to the states proper. These territories are sometimes referred to as "incorporated."

Second, in those territories where, due to different historical, cultural, and racial backgrounds, it would be awkward to extend all the guarantees only the fundamental guarantees hold. These territories are frequently referred to as "unincorporated." Which guarantees are fundamental and which are merely formal the Supreme Court will decide as cases arise. The right of trial by jury has been held to be only a formal right and not a fundamental one, and hence is not guaranteed in all the territories. The right of life and liberty would probably be held a fundamental right.

The distinction between "incorporated" and "unincorporated" is not very clear because Hawaii is sometimes called incorporated, and yet only the fundamental guarantees apply in that island. The distinction is in reality on the basis of race and culture rather than on the form of territorial government. It may seem cynical, but it is not bad constitutional law to say that, all guarantees apply only to territories peopled by a like race, while a territory peopled by a race alien to our own is protected only by what the Supreme Court has called fundamental guarantees.

Third, the prohibitions as to slavery and the liquor traffic apply to all territories.

Fourth, provisions expressly limited by the Constitution only to the states, apply to *none* of the territories.

Fifth, the judiciary article applies to none of the territories.

DISTRICT OF COLUMBIA.—The District of Columbia is entirely under the jurisdiction of the federal government. Some of the municipal problems are handled by a



board of local commissioners established by Congress, but most of the affairs of the District are handled directly by Congress. All constitutional guarantees in any way applicable to territories are in force in the District.

In the preceding chapters we have examined the general features of our constitutional system as well as some of the constitutional problems relative to them. In the following chapters we shall devote especial attention to those clauses of the Constitution which have been the most prolific in giving rise to constitutional problems and to which the Supreme Court has been compelled to give much attention.

## CHAPTER VI

### INTERSTATE COMMERCE AND ITS REGULATION

**I** NTERSTATE AND INTRASTATE COMMERCE.—If Congress had been given power to regulate *commerce in general* there would be no necessity in a study of constitutional law to distinguish between interstate and intrastate commerce. The power of Congress, however, does not extend to all commerce, but only to that “with foreign nations, and among the several states and with the Indian tribes.” This leaves to each of the states the regulation of commerce within its borders. If a Cleveland manufacturer sends a carload of goods to Louisville, the shipment is under federal control, for it is interstate commerce. If, however, he sends a carload to Cincinnati, it is intrastate commerce and is under the control of Ohio. The two cars may be a part of the same train, yet one car is more clearly under federal jurisdiction than the other. Because the control of commerce is thus divided between the federal government and the states it is often necessary to draw legal and constitutional lines between different parts of the same business.

Many careful students of governmental problems believe that it would be highly desirable to centralize control over commerce at Washington. With our nationwide commercialism, which crosses and recrosses state lines with the greatest facility, it is almost ridiculous to try to sift out for state control that part of the entire commercial process which happens to be wholly within a state. At any rate, it would have been much more

convenient for students of constitutional law if the federal government had been given control over all commerce, including intrastate. We are, however, engaged in a study of our Constitution as it now exists and we must face the complicated problems which arise because of this somewhat artificial division of control over commerce.

WHAT IS COMMERCE?—Because the control of commerce is divided between the states and the federal government it is essential that the term *commerce* be clearly defined. The first great case involving the commerce clause was *Gibbons v. Ogden*,<sup>1</sup> which was decided in 1824. The state of New York had given an exclusive grant to navigate the waters of the state by steamboats to Fulton and Livingston, who had in turn given a license to Ogden. Gibbons, on the other hand, was operating steamboats between New York and New Jersey by license from the federal government. Ogden claimed that New York had given him the exclusive right to navigate the waters of New York state and the state courts issued an injunction ordering Gibbons to discontinue the operation of his boats in New York waters. Naturally, Gibbons brought the matter before the Supreme Court and insisted that Congress through its power over interstate commerce could regulate navigation. The court supported the contention of Gibbons and held that by commerce was meant intercourse, including navigation, and that a permit from Congress to operate boats between states was good in spite of a monopoly in the use of state waters granted to another person by the state.

The decision in the case of *Gibbons v. Ogden* was the beginning of a long line of cases interpreting the term *commerce*. Commerce includes the carrying of goods,

<sup>1</sup> 9 Wheaton 1.

passengers, and communications. Sending messages by telegraph and telephone is commerce, as is also the use of the radio. The transportation of oil or other fluids in pipe lines is also commerce. The passage of passengers and vehicles over a bridge is held to be commerce, even though the passage is for pleasure rather than for trade purposes. That all of these activities are classed as commerce means that Congress may control such parts of the activities as are interstate.

Many forms of activity have been held not to be commerce. Manufacturing, farming, lumbering, mining, and so forth are not commerce in themselves, and hence are not under federal control. As soon as their products begin to move, however, there is commerce, and when such commerce is carried on between states the federal government may regulate. A type of business which, in spite of its commercial nature, has been held *not* to be commerce is insurance. When the matter first came before the court in 1868 the activities of a life insurance company were held not to be commerce.<sup>1</sup> Since that time other forms of insurance have also been held to be outside the scope of the term. If insurance is not commerce, it cannot, of course, be interstate commerce, and is therefore outside of federal control. It is because of this line of decisions that the complete authority to regulate insurance companies is exercised by the several states. If the courts had interpreted the commerce clause as covering insurance the federal government would to-day possess, and no doubt exercise, broad regulatory powers over the great insurance companies whose activities extend across state lines.

WHEN IS COMMERCE INTERSTATE?—Whenever goods, passengers, or messages are carried or transmitted across a state line the transaction becomes interstate and sub-

<sup>1</sup> Paul v. Virginia, 8 Wallace 168.

ject to federal regulation. The logic of the situation makes it clear that the United States rather than the states should regulate in such cases, as no one state has complete control over the journey and such an activity can be supervised and regulated effectively only by the federal authorities. Some interesting cases have arisen when goods have been shipped from one point in a state to another point in the same state, with a part of the journey outside of the state. In such cases the journey has been called interstate, and logically so, for even though both the origin and the destination are within the same state, the shipment is outside of the state for a part of the time and no one state can possibly exercise complete control over the shipment.

When oil or gas or even water is carried by pipes across state boundaries the transaction is interstate commerce. Up to the present time the United States has not exercised its power over gas and water pipes between states. It has, however, regulated oil pipe lines. Persons walking across a state line are engaged in interstate commerce, as are vehicles carrying persons who are driving for pleasure as well as for business reasons. A person maintaining a bridge between two states is engaged in interstate business as clearly as one operating a boat across a river forming an interstate boundary. Perhaps radio messages will be held to be entirely under federal control, as it is hardly possible to conceive of such communications as being intrastate, or local, in character. Congress attempted some time ago to protect migratory birds under the commerce power, but the court declared that such migrations did not constitute commerce. Later, a treaty was made with Canada, and by its provisions protection is given to certain birds. This protection, however, results from the treaty-making power and not from the power over interstate commerce.

WHEN DOES THE INTERSTATE JOURNEY BEGIN?—It is important to determine when the interstate journey begins, for as soon as it is begun the jurisdiction of the state ceases and that of the United States begins. Federal jurisdiction does not begin with the manufacture of an article, even though it is intended for shipment outside the state. Even the crating and the packing of an article preparatory to interstate shipment do not give the federal government control over it. It is only when it is actually delivered to a railroad company or some other common carrier,<sup>1</sup> or if transported by the owner, when the journey is actually begun, that it takes on the character of interstate commerce. In Ohio all goods in the possession of the taxpayer on the first Sunday in April must be returned for taxation. An Ohio manufacturer, for example, cannot be taxed by the state on any article actually on its way to a point outside the state. But unless the journey is actually begun or the goods are delivered to the common carrier, they are taxable. Logs brought to the side of a stream to wait for seasonal high water to carry them away are not yet in interstate commerce, said the Supreme Court in the case of *Coe v. Errol*,<sup>2</sup> and the general property tax levied on such logs by the state was entirely valid. When goods are on a continuous journey from one state to another they are considered as being in interstate commerce, even when carried for a portion of the journey by a railroad operating entirely in a single state or when carried by a ship operating entirely within the waters of one state.

WHEN DOES INTERSTATE COMMERCE END?—Any unexpected or unnatural interruption of the interstate journey does not bring it to an end. Suppose, for ex-

<sup>1</sup> A common carrier is a person or corporation carrying goods or persons for pay.

<sup>2</sup> 116 U. S. 517.



ample, that a trainload of automobiles is being shipped across the state of Ohio and that a portion of the train is wrecked and the railroad cars demolished. The automobiles taken from the wrecked train are placed in a near-by storage garage while the tracks are being reopened to traffic. Such automobiles are not subject to Ohio jurisdiction and cannot be taxed, even though they happen to be in the state on the particular day when property is listed for taxation. Live stock may be removed from railroad cars during an interstate journey to be watered and rested and still be a part of interstate commerce. Cattle driven on foot through a state are still in interstate commerce, even though a reasonable stop is made and even though the cattle during the trip are pastured. Of course, any stop longer than is a necessary part of the journey would mean that the journey ceases to be continuous and is therefore ended.

As soon as interstate commerce ceases the state has complete control of the shipment. For this reason it is very important to decide the exact time when the interstate character is lost. If a commodity should cease to be interstate the moment it reaches its destination and is in the hands of the consignee,<sup>1</sup> it would mean too much power in the hands of the state, as it would be possible for the state to prohibit the sale of an article brought in through interstate commerce. Obviously this would greatly lessen the authority of the central government over commerce between states. The object of interstate commerce in most cases is to sell the commodities transported, and, if the state can prevent the sale, the transportation would in most cases be of little value. If Ohio prohibits the sale of cigarettes it does not follow that cigarettes cannot be shipped into the state. Ohio cannot

<sup>1</sup> The consignee is the party receiving a shipment as opposed to the consignor who makes the shipment.

prohibit goods from coming into the state. That is a federal matter. Neither can Ohio absolutely prohibit the sale of cigarettes in the original interstate package, for such prohibition would be an undue interference with interstate commerce. Before the days of national prohibition the dry states attempted to prevent the sale of liquor coming into the state, but the courts held that the first sale after coming into the state must be permitted. Otherwise there would be state interference with interstate commerce. Of course, Congress had the power even before the Eighteenth Amendment to prohibit the shipment of liquor in interstate commerce. In fact, Congress did enact legislation making illegal the shipment of liquor into dry states. State action, however, would not have been sufficient because the first sale of any goods shipped in from outside the state might be made in spite of local laws. The problems involved in determining the boundaries between federal and state control in interstate commerce have given rise to the famous original-package doctrine.

ORIGINAL PACKAGE DOCTRINE.—This doctrine was announced in part in 1827 in the case of *Brown v. Maryland*.<sup>1</sup> The state of Maryland had levied a tax on the sale of imported goods and this the Supreme Court said was an interference with the sale of imports. Goods imported may be sold, said the court, in the original package without interference by the state. Furthermore, imports in the original package must not be taxed by the state. This case involved only imports from foreign countries, but years later the Supreme Court held that the original package from another state—as well as from foreign countries—might be sold *once* in spite of state laws to the contrary. This was brought out particularly

<sup>1</sup> 12 Wheaton 419.

in 1890 in the case of *Leisy v. Hardin*,<sup>1</sup> which emphatically declared that a state cannot prevent the first sale of an original package of liquor shipped from outside the state. Because of the Eighteenth Amendment this rule has now changed as to liquor shipments, but the principle still holds for other commodities. If the Supreme Court was willing to prevent the state from stopping the sale in the original package of commodities of such questionable nature as intoxicants, there is all the more reason why the state should not be allowed to control the first sale of other commodities shipped into the state.

The state then has no power to regulate the sale of the original package, but if the package is broken it immediately ceases to be interstate commerce. Some states prohibit the sale of cigarettes, and in at least one case the dealer attempted to evade the law by receiving the cigarettes in small retail packages, which were delivered by the express company in baskets. Here the court very properly insisted that the small retail package was not the "original package." The original package must be of such size as is usual in the shipment of the particular goods, and any obvious attempt to ship tiny packages loose in a box car, as was done by one cigarette dealer, would not allow him to sell each package separately. He could, of course, sell the original unbroken carton with impunity. Furthermore, if the original package is used it immediately ceases to be interstate commerce. No actual cases have come up under this point, but it is obvious that if a states wishes to prohibit the carrying of pistols, for example, it should not be left powerless in the case of the man who carries pistols shipped in from outside the state. It would be ridiculous

<sup>1</sup> 135 U. S. 100.

for such a person to argue that, because the original package has not been sold or broken open, it is outside of the police power of the state.

**TAXATION OF THE ORIGINAL PACKAGE.**—In *Brown v. Maryland* the court held, as indicated in the previous paragraph, that the state cannot levy a tax on the original package imported from abroad. This rule has not been followed in the case of interstate commerce, and a state may tax goods in interstate commerce the same as other property as soon as it reaches its destination, and is in the hands of the consignee even though it is still in the original package. It is proper that the state should levy a tax on the original package, for there is no reason why a jobber with a warehouse full of dry goods should escape taxation on all of this property simply because it is still in the original packages. The state, however, cannot levy a special tax on such goods, but must tax them the same as other property.

If the original package consists of goods imported from foreign countries, however, no state tax may be levied upon it. Why does this distinction exist as between goods coming from abroad and goods coming from another state? The distinction has a logical basis because most of our imports come through a comparatively small number of ports. In these ports imports are temporarily stored by importers before being distributed to all parts of the country. If the state of New York, for example, could levy a property tax on all imports in the warehouses under its jurisdiction, it could, in a sense, collect tribute from the ultimate consumers in all parts of the United States.

**SUMMARY OF STATE POWER OVER ORIGINAL PACKAGE.**—The relation between state authority and the original package may be summarized as follows: First, the

state may neither tax nor exercise police power <sup>1</sup> over *imports from foreign countries* until the original package is sold once, broken open, or used.

Second, the state may not exercise police power over goods shipped *from another state* until the original package is sold once, broken open, or used, *but it may tax* such original package as soon as it is in the hands of the consignee, provided, however, that it is taxed only as other property in the state is taxed.

Third, by the original package is meant one of such shape and size as is ordinarily used in the particular business involved. Any attempt to evade state jurisdiction by using unusual packages would not be upheld by the courts.

FEDERAL POWER OVER INTERSTATE COMMERCE.—So far in this chapter we have tried to draw lines between interstate and intrastate commerce. We shall take up next the constitutional questions arising from the control of interstate commerce by the federal government. The regulation of railroads and other common carriers engaged in interstate commerce has received the careful attention of Congress. The Interstate Commerce Commission was established in 1887 and has been given more and more power over interstate carriers. Through the commission Congress regulates interstate rates of railroads, pipe lines, express, telephone, and telegraph companies, and prescribes uniform accounting by all carriers. Laws regulating the use of safety appliances and the hours of labor on interstate trains have also been passed.

But the federal government has not limited itself to the regulation of merely the instrumentalities of interstate commerce. It has passed laws prohibiting agree-

<sup>1</sup> By police power is meant the power to regulate conduct in the interest of the common welfare. See Chapter XI for further discussion.



ments in restraint of trade and other unfair methods of competition, as far as such methods relate to interstate commerce. The regulation of methods of business is a state affair unless interstate commerce is affected. The nation-wide nature of our commercial system, however, opens a great field for federal regulation. The administration of laws regulating business methods in interstate commerce is in the hands of the Federal Trade Commission. The federal government may not prevent monopolies unless these affect interstate commerce. When the American Sugar Refining Co. took over several refineries in Pennsylvania it was held by the court<sup>1</sup> that this merger was not a violation of the federal law, as it affected interstate commerce only incidentally. If, however, a combination of manufactures is intended to control and restrain interstate commerce, such a combination can be prohibited by the federal law.<sup>2</sup> Mergers of interstate railroad companies can be regulated or prohibited by the federal government.

**IMPLIED POWER OF THE FEDERAL GOVERNMENT OVER INTERSTATE COMMERCE.**—The federal government has exercised more implied power under the commerce clause than under any other express grant. Such implication is, however, very clear. The states have only limited authority to exercise police power over interstate commerce, and, even though they had such authority, it would result only in disunified and piecemeal regulation. It is not conceivable that there should be a sphere of anarchy in interstate commerce and such would be the case if the federal government did not exercise great implied powers.

Congress has passed many laws regulating interstate commerce in the interest of public morals, and these

<sup>1</sup> *U. S. v. E. C. Knight Co.*, 156 U. S. 1.

<sup>2</sup> *Addyston Pipe and Steel Co. v. U. S.*, 175 U. S. 211.



have uniformly been upheld. It was not until the most recent decades, however, that Congress made any attempt to use the commerce power to protect public morals. The main reason for the lack of earlier legislation of this type is that before the development of roadroads commerce was much more largely local and the individual states were in a position through their power over intrastate commerce to regulate very effectively. Besides, the responsibility of the state for public morals is comparatively a recent development. The first legislation of importance designed to prevent the use of interstate commerce as a shield for improper activities was the law passed in 1895 which prohibited lottery tickets from being shipped into any state from another state or from a foreign country. Those who opposed the legislation contended that it was unconstitutional on three grounds:<sup>1</sup> first, that the transportation of lottery tickets is not interstate commerce; second, that the regulation of morals is a part of the police power reserved to the states and not delegated to the federal government; and third, that power merely to regulate did not warrant complete prohibition.

In support of the first contention it was argued that lottery tickets were like insurance contracts, promises to pay under certain conditions, and that, as commerce had been held not to include insurance, neither should lottery tickets be controlled under the commerce power. The Supreme Court, however, held the lottery tickets to be subjects of commerce, and that, therefore, Congress might regulate interstate shipments. As to the second proposition, the champions of the lotteries insisted that the shipment of the tickets interfered in no way with interstate commerce and that Congress is limited to such control only over commerce between states as will insure

<sup>1</sup> Lottery case, 188 U. S. 321.

prompt and safe transportation. The members of the Supreme Court were not in agreement on this point, but the majority held that the express power to regulate commerce clearly implied the right to exercise whatever control is necessary for the protection of the public, and that the federal government might exercise such police power over interstate commerce. This decision has much greater importance than merely prohibiting lotteries in interstate commerce, desirable as such a prohibition may be, for it indicated clearly that the court was willing to give Congress wide latitude in implying power from the commerce clause. Lottery tickets are not difficult to handle in commerce. A bundle of tickets impedes interstate commerce no more and no less than a bundle of Sunday-school leaflets of the same size. Clearly the anti-lottery law was not necessary to protect commerce. Its obvious intention was to protect the public against the anti-social influences of the lottery.

The third objection to the anti-lottery law was also overruled. The court said that any practice which was of such an injurious nature that the states might prohibit it might also be absolutely prohibited in interstate commerce. This clearly is a wise decision. If the court had held otherwise and should have denied the right of Congress to prohibit completely the shipment of certain commodities, it would mean that both the central government and the states would be powerless to regulate the use of interstate commerce for purposes which are anti-social, and that the United States government could prohibit the shipment only of such articles as might actually interfere, by their mere presence in commerce, with its safety and efficiency. This decision, of course, is quite in line with other decisions, holding that Congress may prohibit the shipment of intoxicating

liquor in interstate commerce even in the absence of a federal prohibition amendment.

Congress has also enacted a law prohibiting the shipment between states of obscene publications. This law has never been attacked before the Supreme Court, but the lower courts have declared the law valid and no doubt the Supreme Court would sustain this decision. Perhaps the most famous legislation intended to protect public morals through interstate commerce is what is known as the White Slave Act passed in 1910. This law punishes severely the transportation of women for immoral purposes from one state to another. Such transportation is completely out of state control, and federal legislation only is effective. This legislation has been held valid by the Supreme Court in spite of repeated attacks upon its constitutionality.

In 1912 an Act of Congress prohibited the interstate transportation of prize-fight films. The Supreme Court has declared this a valid exercise of implied commerce power.<sup>1</sup> Recently the court upheld a law punishing those who use the privileges of interstate commerce to dispose of stolen goods.<sup>2</sup>

The implied power of the federal government also extends to the protection of public health. The Food and Drugs Act of 1906 makes it unlawful to ship food products or drugs in interstate commerce when they are adulterated, deleterious, unfit for use, or are misbranded. This was an extension of the principle previously enacted that meat products should be carried out of the state only after federal inspection. The food-and-drugs legislation is obviously intended to protect the public rather than to protect interstate commerce. The shipment of adulterations and misbranded products certainly does not impede

<sup>1</sup> *Weber v. Freed*, 239 U. S. 325.

<sup>2</sup> *Brooks v. U. S.*, 267 U. S. 432.

transportation any more than does the carriage of pure and properly branded commodities. The Food and Drugs Act has been upheld not only as a measure to protect the public health, but also as a means of protecting the public against fraud. The power of Congress to prohibit the use of interstate commerce for fraudulent purposes is now unquestioned.

In one instance, at least, and a most conspicuous one, the courts have, however, refused to permit the regulation of commodities in interstate commerce. In a long series of enactments Congress has stretched its implied power more and more, but at last it overreached itself. At least, the court was of that opinion, and the opinion of the court, of course, settles the matter. In 1916 Congress passed a law to the effect that the products of any mine or factory in which child labor was employed should not be shipped in interstate commerce. Here was another obvious attempt not to protect interstate commerce, but to protect children against undue exploitation, and, further, to protect the operators of mines and manufacturers in states where child labor laws were found. Many students of the Constitution confidently expected the Supreme Court to uphold this law. When the matter was brought before it in the case of *Hammer v. Dagenhart*<sup>1</sup> the court was divided, but by a vote of five to four the law was held unconstitutional. The court asserted that Congress was trying to regulate mining and manufacturing and that this was an unwarranted intrusion upon the rights of the states. The dissenting opinion was written by Justice Holmes, who called attention to the fact that if Congress may under the commerce clause protect the public against impure food and young women against transportation for immoral purposes, it might also under the same clause

<sup>1</sup> 247 U. S. 251.

protect children against exploitation and employers in states having child-labor laws against unfair competition. At any rate, the decision in the case was in marked contrast to the long line of cases extending the implied commerce power. In fairness to the court, however, it should be remembered that the child-labor law went further in extending federal power than had any other federal statute regulating commerce. As we have observed in an earlier chapter, Congress made an unsuccessful attempt to regulate child labor under the taxing power. When this law was also nullified by the courts, any federal regulation of child labor was made impossible except through a constitutional amendment.

DOES THE FEDERAL GOVERNMENT HAVE EXCLUSIVE CONTROL OVER INTERSTATE COMMERCE?—The elementary statement covering the division of power over commerce between the federal government and the several states is usually as follows. The federal government has control over *interstate*, and the states over *intrastate*, commerce. This is satisfactory, however, only as a general or introductory statement. When we begin to examine constitutional law more closely on this point we find a number of marked exceptions. These exceptions are of two kinds; first, there are certain situations in which the *state* may regulate *interstate* commerce, and, second, there are circumstances under which the *federal government* under its express power to regulate interstate commerce has the implied power to regulate *intrastate* commerce as well. In other words, there are exceptions in both directions; the state under certain conditions reaches into the interstate field and under other conditions the central government touches intrastate transactions. We shall discuss these two types of exceptions in the order named and shall first take up the cases in which the state regulates interstate commerce.



WHEN MAY THE STATES REGULATE INTERSTATE COMMERCE?—We have already noted that Congress may have exclusive power in a given field or it may have the power concurrently with the states. In the case of interstate commerce we have an instance of concurrent power. The great mass of the power is in federal hands, but not necessarily all of it. The leading case dealing with the question of state control over interstate commerce is that of *Cooley v. Port Wardens*.<sup>1</sup> The state of Pennsylvania had enacted a law which required that all ships entering the port of Philadelphia should employ a licensed pilot. This applied also to vessels engaged in interstate and foreign commerce. If the federal power was exclusive the Pennsylvania law would, of course, be invalid. The Supreme Court upheld the law, however, and clearly stated that the regulation was of such a local character that the state might properly legislate. At the same time no federal law had been enacted regulating pilotage. Any law of Congress would, of course, be paramount over state laws. As a result of this decision matters of a local nature may be dealt with by the states even when they relate to interstate commerce, provided Congress has taken no action on the particular point involved.

When the regulation of railroad rates was undertaken by the separate states the question naturally arose as to whether this was a local matter to be handled by the separate states or a matter for the federal government. In the decades following the Civil War the states not only fixed railroad rates within the state, but in some cases also attempted to fix the rates on interstate shipments. At first the Supreme Court was inclined to look upon rate-making as a local matter, and upheld state laws even when they fixed interstate rates. Such a situa-

<sup>1</sup> 12 Howard 299.



tion, however, inevitably led to great confusion and to conflicts between state rate-making laws. The whole matter came to a head in an attack upon an Illinois statute which forbade a toll within the state as high as tolls for a longer distance anywhere on the lines of the same road, regardless of whether the longer distance included portions of the railroad outside of the state. Here was a state law in effect directing the amount of charges for an interstate haul. When in 1886 the question was presented to the court, it was decided that the fixing of interstate rates is *not local* in character and that, therefore, the matter is entirely in the hands of the federal government.<sup>1</sup> As a result of this decision all state laws fixing rates for interstate shipments were null and void. A further result was the establishment the next year of the Interstate Commerce Commission and the accompanying enactment of federal laws relative to interstate rates.

Even though the states through the Wabash case lost all power to fix interstate rates, there remained and still remain many matters of a local nature which may, in the absence of federal regulation, be handled by the several states. Under the police power a state may regulate a great many details relative to the instrumentalities of interstate commerce. In the absence of congressional action the state of Ohio may, for example, regulate the use of drinking cups on trains even on interstate trains passing through the state. A state regulation must not place an undue burden on interstate commerce. A state law requiring that all trains shall stop at all stations would be considered as an undue interference in case of interstate trains, but a provision that a reasonable number of trains stop in the more important towns would be held a reasonable exercise of state police

<sup>1</sup> Wabash Railway Co. v. Illinois, 118 U. S. 557.

power. Of course, any federal law regulating the stops of interstate trains would take precedence over state laws. A Massachusetts law prohibiting the sale of oleomargarine colored to look like butter has been upheld even as applying to the original package. A New York law forbidding anyone to possess dead game during the closed season was upheld as applying to game killed elsewhere and shipped into the state. These two decisions were based on the theory that in the absence of federal regulation the state might regulate interstate shipments in order to protect its citizens against fraud. In this way these laws serve a local purpose.

To summarize: the state may regulate matters pertaining to interstate commerce when two conditions are present,—first, when the matters involved are local in their nature and, second, when the subjects involved have not been dealt with by the federal government. In other words, if the matter is not local in its nature the states may not legislate. Furthermore, even though the matter is of a local character, the states may not legislate if it has been made the subject of Congressional action. Under no circumstance must the state place any undue burden upon interstate commerce. Exactly what is an undue burden as well as what is local in character are matters which must ultimately be decided by the courts.

WHEN MAY THE FEDERAL GOVERNMENT REGULATE INTRASTATE COMMERCE?—The simple statement that the states have complete control over intrastate commerce must be revised in the light of recent court decisions. It is especially in the matter of regulating railroad rates that the states have lost power. Previous to the decision in the now famous Shreveport case<sup>1</sup> handed down in 1914 the several states had exercised complete authority

<sup>1</sup> *Houston, East and West Texas Ry. Co. v. U. S.*, 234 U. S. 342.

over the making of local rates. This case arose out of the complaint made by the commercial interest of Shreveport, Louisiana, that the local rates in Texas worked to their disadvantage. Shreveport is a distributing center located near the Texas boundary. Much of its business is transacted with towns in eastern Texas. The rates for shipping goods from Shreveport to the towns in Texas had, naturally, been fixed by the federal government through the instrumentality of the Interstate Commerce Commission. Shreveport, however, had very vigorous competition for the Texas trade from Texas distributing points, especially Dallas. The rates from Dallas to points in the Texas territory near Shreveport had been established by the Texas Railway Commission. Here we have the jobbers of Shreveport shipping goods into near-by territory but compelled to use *interstate* rates, while their competitors in Dallas paid the lower *intrastate* rates. The Texas town of Marshall, for example, was only forty-two miles from Shreveport, and yet the interstate rate between the towns was higher than the intrastate rates between Dallas and Marshall, although the distance between them was 148 miles. Between Shreveport and Marshall the rate on wagons, for instance, was 56 cents per hundred pounds, while the rate from Dallas to Marshall—a distance over three times as great—was only 36.8 cents. Obviously this gave a marked advantage to the Dallas distributors. The complaint came first to the Interstate Commerce Commission. It was clear that something had to be done to remedy the situation. Either the intrastate rates would have to be raised or the interstate rates lowered, or both. The Interstate Commerce Commission had already established the interstate rates on the basis of a fair return to the carriers on their investment, and it saw no reason for lowering them. So, in order to pro-

tect the Shreveport interests, the commission was compelled to send out an order the like of which had never been issued before. This order directed the railroads operating in the territory to raise their intrastate rates to such a point that there would be no undue discrimination against Shreveport. Here, indeed, was a new departure. A *federal* agency was directing the carriers to raise *intrastate* rates. The dispute was properly taken to the Supreme Court. Here it was decided that the order of the commission was valid. The court said that the authority of the federal government to regulate interstate commerce carries with it the right to regulate incidentally intrastate commerce also, whenever intrastate regulation is necessary for the protection of interstate commerce. This was an epoch-making decision. It was the first step in the movement which gave the federal government the right to establish practically all transportation rates, local as well as interstate.

The second step was the case of *Railroad Commission of Wisconsin v. C. B. & Q. Ry. Co.*,<sup>1</sup> in which the principle enunciated in the Shreveport case was made still broader. In 1920 Congress gave the Interstate Commerce Commission authority to increase local as well as interstate rates whenever such increase was necessary to give the railroads a fair return on their investment. The commission issued an order fixing passenger rates, local as well as interstate, at 3.6 cents per mile. In Wisconsin by a state law the railroads were forbidden to charge more than 2 cents per mile for intrastate journeys. The question as to whether the Wisconsin rate or the federal rate should apply was in 1922 brought before the Supreme Court, which upheld the federal rate. From this decision it is evident that the power of the central government over intrastate rates is practically unlim-

<sup>1</sup> 257 U. S. 563.

ited in all cases where its regulation is conducive to greater efficiency in interstate commerce. The situation was stated in a nutshell by Chief Justice Taft, who wrote the decision in the case, as follows, "Commerce is a unit and does not regard state lines, and while, under the Constitution interstate and intrastate commerce are ordinarily subject to regulation by different sovereignties, yet when they are so mingled together that the supreme authority, the nation, cannot exercise complete effective control over interstate commerce without incidental regulation of intrastate commerce, such incidental regulation is not an invasion of state authority."

The states, of course, still retain the power to regulate intrastate rates in the absence of congressional regulation. Congress may incidentally fix local rates in the interests of interstate traffic, but if it fails to do so the state has control over the rates. Furthermore, the absorption of rate-making power by the United States does not take away the police power of the state over intrastate commerce. In the interest of public health, morals, and safety the state may regulate local traffic, but not in a way that will place an undue burden upon interstate commerce.

From the discussion in the preceding paragraphs it is evident that the power of the federal government has been greatly increased at the expense of the state. How much farther this movement will go it is difficult to say. It may be safe to say that the control of the central government will be still further strengthened as time goes on. The commercial interdependence of various sections of the country and the welfare of all concerned will be furthered by uniformity of regulation.

**STATE TAXATION OF INSTRUMENTALITIES OF INTERSTATE COMMERCE.**—The state may not tax goods or persons transported in interstate commerce. It can levy



no tax which interferes with commerce among the states. But what about property located in the state and used in carrying interstate commerce? Such property receives the protection of the state. Should it not be taxed? Should an interstate railroad crossing the state of Ohio, for example, be exempted from paying taxes on its property in Ohio? Answers to these questions may be summarily stated as follows: The state cannot levy a tax on the agencies of interstate commerce *as such*, but it is quite within its power to lay a property tax on such agencies the same as on other properties within its jurisdiction. A state tax based on the tonnage of goods transported is invalid when it applies to goods carried between states. Pennsylvania attempted to levy such tax as early as 1864, but the court held it to be an undue interference with interstate commerce.

At various times state taxes have been levied upon the gross receipts in interstate commerce. If such gross receipt taxes are levied in good faith as a substitute for property taxes, they are constitutional. But the amount of taxes so raised from a person or corporation must not exceed what might reasonably be raised as a property tax. Gross receipt taxes levied *as such* are invalid, but, on the other hand, gross receipts may be used as a basis for measuring the amount of business. The state may also levy a tax on franchises granted to corporations, even though these corporations engage in interstate business. The franchise tax may constitutionally be based on the amount of business done. The state may tax the right of way, the rolling stock, and terminals of an interstate railroad company when such property has a *situs* for taxation within the state. Just exactly what constitutes *situs* for purposes of taxation will be taken up in detail in Chapter X. Of course, no tax may discriminate unfavorably against such property. A



small tax per pole on interstate telegraph companies has been upheld as a reasonable charge for state protection. A state law which prohibits any agency from engaging in interstate business unless it pays a tax would, however, be unconstitutional.

A state may charge a reasonable fee for the use of improved roads or waterways, and agencies carrying interstate commerce may be compelled to pay such a charge. A state may also charge an inspection fee on goods entering the state when there is reasonable justification for inspection and when the fees are substantially no larger than are necessary to pay the costs of inspection.

Licenses for canvassers and peddlers raise interesting questions when they involve the sale of goods from another state. A license or tax levied on a person taking orders for goods which at the time are located outside the state is an unwarranted interference with interstate commerce. The Tennessee legislature passed a law providing that all "drummers" taking orders for goods in Memphis should pay a license of \$25 per month. The Supreme Court said that such licensing was unconstitutional as far as it applied to "drummers" representing firms outside the state of Tennessee.<sup>1</sup> The fact that representatives of Tennessee firms were also taxed did not alter the situation. The objection here was not so much discrimination as absolute interference with trade from other states. It practically is a settled rule of constitutional law, then, that no state may require licenses or otherwise interfere with canvassers taking orders for goods to be sent into the state.

In the matter of peddlers the rule is not quite the same. Peddling has been held to be of such marked local character that a reasonable charge may be levied even

<sup>1</sup> Robbins v. Shelby County Taxing District, 120 U. S. 489.

against those peddlers who carry and offer for sale original packages of interstate shipments. But there must be no discrimination against peddlers who handle goods from outside the state. The legislature of Missouri enacted a law requiring that all peddlers selling goods which were not grown, produced, or manufactured in the state must pay a license. Peddlers selling Missouri goods were exempt from paying the license. A Mr. Welton was convicted for peddling sewing-machines made outside the state, and appealed to the Supreme Court of the United States. The resulting decision was to the effect that the Missouri law was an unfair discrimination against interstate commerce.<sup>1</sup> If the Missouri law had applied to all peddlers, no doubt Welton would have been liable also to pay the license. On the other hand, if he were carrying only a sample and devoted his time to taking orders for machines to be shipped into the state later, he would be classed as a canvasser, or "drummer," rather than as a peddler. The distinction between peddlers and canvassers seems a justifiable one. To summarize: no state license can be required of a canvasser taking orders for goods located outside the state at the time of the canvass. A peddler handling goods shipped into the state and still in the original package may be required to pay the same license fee as is required of other peddlers in the state.

POSTAL POWER AND INTERSTATE COMMERCE.—Goods which are carried in the mails are under the control of the federal government even though the journey is entirely within a state. If a package is shipped by express from Cincinnati to Cleveland and another is sent by parcel post between the same cities, the first is under Ohio jurisdiction and the second under the control of the United States. The original-package doctrine, however,

<sup>1</sup> Welton v. Missouri, 91 U. S. 275.

does not hold as far as mail shipped within the state is concerned. Congress may forbid the use of the mails to enterprises which are anti-social, even though it does not have the power to declare such activities criminal. For instance, Congress has no power to legislate against lotteries, but it may prohibit them from using the mail. When Congress first excluded lottery tickets from the mails the law was attacked as unconstitutional. The Supreme Court, however, held that when the federal government was given the power "to establish post offices and post roads" it was clearly implied that the states surrendered to it the complete power which they individually had held to prohibit the use of the mails to any enterprise which was detrimental to the general welfare. Thus the federal government may prohibit the use of the mail for fraudulent purposes such as advertisements for, and sales of, quack medicines. It may prohibit also the carrying of obscene literature as well as matter which is treasonable and unduly critical of the government. In this connection it should be noted that there is always a danger that government officials may encroach upon freedom of speech. This subject will be discussed further in Chapter VII.

Congress may, under the postal power, prohibit any private organization from establishing and operating a mail system. In other words, the postal clause empowers Congress to make the postal service a government monopoly.

How large may a package be and still be classed as mail? Was it the intention of the makers of the Constitution to limit the postal service to communications and very small bundles? The recent development of the parcels post indicates that the opinions are changing as to what constitutes "mail." No doubt Congress has wide discretion in determining the maximum weight

and size of packages which may be handled through the post office. It is not unlikely that the Supreme Court would uphold a law providing for the acquisition, by the government, of telegraph and telephone lines. These agencies may properly be classified under the head of communications, under which head the postal service was practically the only item in 1789. Perhaps the clause might even be stretched so far as to cover the government ownership and operation of railroads.

**FOREIGN COMMERCE.**—The federal government has complete power over foreign commerce. It may constitutionally prohibit completely the exportation or importation of goods. Particular types of goods may be singled out for unfavorable discrimination, as may also trade with particularly specified foreign countries. Such discrimination, of course, may lead to international difficulties, but there is no question as to the legal and constitutional power of Congress to go to whatever length in this direction it sees fit. The import taxes may be levied in any way that Congress may wish, and no one has any constitutional right to object to unfair discrimination under the tariff. The only remedy is to influence Congress by political means to change the tariff. As pointed out in an earlier chapter, no export tax may be levied. This does not, however, prevent Congress from regulating or even prohibiting completely such exports as it wishes. The federal government may exclude all aliens, or admit such classes of aliens as it deems proper. Complete power over shipping is also vested in the central government. Foreign vessels may be prohibited from entering our ports, or, if they are permitted, may be compelled to meet the requirements laid down by our government. It must be borne in mind, too, that the United States has power over foreign commerce not only through the commerce clause, but also

because of its control over foreign relations. The power to make treaties also extends over the whole field of foreign commerce.

COMMERCE WITH THE INDIANS.—Commerce with the Indian tribes is looked upon, as far as the powers of the individual states are concerned, as foreign commerce. This rule applies even when the Indian reservation is entirely within the jurisdiction of a state.

## CHAPTER VII

### HOW CONTRACTS ARE SAFEGUARDED

IN THIS chapter we are to discuss the constitutional questions which have arisen in connection with the interpretation of the provision in Section 9 of Article I, which says, "No state shall pass any law impairing the obligation of contracts." This prohibition upon state action, which is often referred to as the *contract clause*, has been most prolific in litigation, and has, therefore, received the most careful attention of the courts. With the exception of the due process clause, later added to the Constitution as a part of the Fourteenth Amendment, there is no constitutional prohibition against state power which has given rise to so many Supreme Court decisions as has this one.

This special protection given to contracts as against *state* interference was not extended in the original Constitution to prohibit *federal* interference. Nowhere in the Constitution can there be found a statement forbidding the government of the United States from passing laws impairing the obligation of contracts. A proposal was made in the constitutional convention to extend this prohibition to the federal government, but the matter received almost no attention and there seemed to be little interest in limiting any possible federal interference with contract rights. Evidently, the framers of the Constitution, while desirous of safeguarding contracts against state interference, preferred to leave the hands of the central government free in the matter. It is possible that the clause was inserted principally to



prevent the several states from repudiating their respective state debts, and more than likely the members of the convention felt that the federal government should be free to repudiate its debts if it so desired. The clause was clearly a recognition of the rights of the creditor class, and the framers, no doubt, had in mind not only the possible repudiation by a state of its own debt, but the possibility of state legislation which would make it difficult to collect on contracts already made.

While this clause does not limit federal power, it must be remembered that the Fifth Amendment to the Constitution prohibits Congress from depriving any person of life, liberty, or property without due process of law. Contracts are forms of property. Any federal law taking away contract rights validly acquired is a violation of the due process clause. Hence the federal government also lacks complete freedom in dealing with the obligations of contracts even though the contract clause does not apply to it. In discussing the contract clause the words and phrases will be taken up in the order in which they appear in the Constitution.

PROHIBITION DIRECTED ONLY AGAINST LEGISLATIVE INTERFERENCE.—The Constitution provides that no state shall *pass a law* impairing the obligation of a contract. A much broader statement would have been made, however, if the Constitution had been made to say that no state shall in any manner impair the obligation of a contract. *Legislative enactments* only are prohibited in so far as they impair the obligation of contracts. A state court may make an unfair decision which lessens the force of a contract, and such a decision would not be in violation of the contract clause. If a sheriff, for example, should be remiss in his duties so as to make it difficult to enforce a contract in his county, such negligence would not be a violation of this clause. Neither

does the prohibition extend against individuals. If a person puts obstructions in the way of collecting a contract he is not violating the Constitution. This particular constitutional prohibition is against the *passing of a law* and not against other possible interferences with contract rights. By *passing a law*, however, is meant not only enactments by the state legislatures, but also ordinances passed by the county board, the city council, or any other subdivision of the state which has been given the authority to pass laws of a local nature. Hence, a city ordinance, for example, which interferes with the right of a water company to enforce its contracts with water users or with the city would be a law impairing the obligation of contracts.

WHAT IS THE OBLIGATION OF A CONTRACT AND HOW MAY IT BE IMPAIRED?—When a valid contract is made there are certain duties which each party must perform, and, likewise, certain rights to which each party is entitled. Each party is under obligation to do or to refrain from doing certain things. If he fails to meet this obligation, the other party may use the machinery of the state either to compel performance or to get damages if the contract is broken. When a contract is made each party has a right to feel that, in case the other fails to fulfill his obligations, there are certain forms of procedure and certain parts of the governmental machine which stand ready to help him in compelling the other party to keep the contract. In the first place, the contract is made with the understanding that the legal machinery of the state as it now stands will be available to enforce the contract in case the other party does not meet his obligations. Any subsequent law, which makes it more difficult to enforce a contract than it was when the contract was made, impairs its obligation and is unconstitutional. If a state should pass a law

invalidating all contracts, this action would clearly be unconstitutional. There is no great danger, however, of a legislature going to such an extreme. The impairment of an obligation is more likely to take milder and more subtle forms, which, nevertheless, may be just as effective. If a law is passed providing that no real estate shall be forcibly sold to pay contract obligations assumed by the owner, it is obvious that many contracts will be adversely affected thereby. All contracts previously made were entered into with the understanding that the ownership of real estate by one party made the contract a safer one for the other, and a law changing the situation to the disadvantage of the creditor would be unconstitutional as applying to contracts already in force. Another good illustration would be laws against usury. Suppose, for example, that a state should pass a law making it illegal to collect interest at a higher rate than 7 per cent per annum. Let us suppose that before the law is passed A agrees to pay B for value received a certain amount with interest at 8 per cent. A would still be held for the higher rate, because a reduction of the interest rates would impair the obligation due B. Of course, the new interest rate would govern in all contracts made *after* the passage of the law.

The obligation of a contract also includes the right to effective remedies in case of a breach of the contract. Any legislation which would deny a man the right to use the courts in enforcing a prior contract would be invalid. Obviously, the remedy must be as efficient as at the time the contract was made. A change of remedy is not an impairment of the obligation if the new remedy is as good as the old. If there are several things a creditor may do to get redress in case a contract is broken, it is not unconstitutional if one of the remedies is taken away as long as the remaining remedies are ade-

quate. In the olden days, when imprisonment for debt was common, contracts were, of course, made with the knowledge that this remedy might be used to compel payment. As early as 1835 the Supreme Court held <sup>1</sup> that a state law abolishing imprisonment for debt is not an impairment of the obligation of contracts even for contracts already made, if other remedies to compel enforcement or to obtain damages were still available.

**BANKRUPTCY LAWS AND THE CONTRACT CLAUSE.**—A bankruptcy law provides that under certain conditions the creditor may be compelled to accept only a certain per cent of what is due him on a contract. If a contract is made at a time when there are no bankruptcy laws, any subsequent law, providing for a discharge in bankruptcy, does not apply. Bankruptcy laws, however, are valid as to future contracts. This seems like a reasonable rule of law, but it was warmly contended in our early history that the contract clause implied that any legislation which weakened the force of future contracts would be invalid. The court, however, was not influenced by this reasoning. It is hardly conceivable that the framers of the Constitution intended to make the contract clause serve as a check on any change in the laws of contracts which would allow leniency under certain circumstances. At any rate, it is now a settled doctrine that the contract clause protects only contracts already made, and a state law making future contracts made within its jurisdiction merely scraps of paper would be constitutional. Such laxity in contract relations would of course be detrimental to public welfare, but it would not constitute an impairment of the obligation of contracts. In reference to bankruptcy legislation, it might be stated that in this field the federal and the state governments have concurrent jurisdiction and,

<sup>1</sup> *Beers v. Houghton*, 9 Peters 329.

further, that the federal government has comparatively recently covered the whole field. Hence, all existing bankruptcy laws are federal. The due process clause protects existing contracts when a new bankruptcy law is passed. This means that the protection against arbitrary federal bankruptcy legislation is the same as that given by the contract clause against state action.

MUNICIPAL BONDS AND THE CONTRACT CLAUSE.—When a city, or any other local government unit, issues bonds, the buyers of such bonds accept them with the understanding that the taxing powers of the municipality remain at least as broad as when the bonds are sold. Any state law, lowering the legal tax rate in a municipality so far as to make it impossible to pay the bonds, unconstitutionally impairs the obligation of the contract made between the municipality and the holder of its bonds. If a municipality carrying a heavy debt is annexed by another municipality, the bondholders have a right to go to the new government, and any law or ordinance which makes it difficult to collect from the new municipality is an impairment of the obligation of the contract. The same principle holds in case a local subdivision is virtually abolished and its territory divided among two or more municipalities. In short, any attempt, through law or ordinance, to make more difficult the task of collecting the interest and principal of municipal bonds as these come due, is unconstitutional.

The contract clause is a prohibition against retroactive legislation impairing the obligation. A retroactive law is one which affects acts which have been done before the law is passed. Not all retroactive laws are unconstitutional, but two kinds of retroactive laws are specifically forbidden by the Constitution. One of these is the *ex post facto* law which will be discussed in Chapter VIII and the other includes any law impairing



the obligation of contracts. As already pointed out, the latter is directed only against the states, while both the federal and state governments are denied the right to pass *ex post facto* laws.

WHAT IS MEANT BY A CONTRACT?—We shall not attempt here to describe the essential features of a valid contract. Any agreement which comes within the legal definition of a contract is protected against impairment by future legislation. The term, however, has somewhat of a wider application than this, for the Supreme Court has, in interpreting the contract clause, included under the term contracts certain types of relationship which are not ordinarily classed as contracts.

GRANTS MADE TO A PRIVATE CORPORATION.—When the state grants a charter to private corporations does it mean that the state may not later change the terms of the charter? If a charter is a contract, it naturally follows that any subsequent law which takes away any of the rights granted is unconstitutional. The question of whether charters are contracts within the meaning of the contract clause was first brought before the court in a dispute which was destined to become the most famous of all the cases involving this clause. This was a dispute between the original trustees of Dartmouth College and the state of New Hampshire. Dartmouth College had been given its charter by the British crown in 1769. The charter provided for a self-perpetuating board of twelve trustees to take full charge of the affairs of the institution. In 1816 the legislature of New Hampshire, desirous of giving the public generally some word in the control of the school, passed a law which virtually took the control of the college away from the old trustees and vested it in a board of overseers who in turn were responsible to the government of the state of New Hampshire. In passing, it might be explained that it



has long been an accepted rule that, when the sovereignty over a territory passes from one government to another, the new government is held responsible for all grants made to parties in that territory by the former sovereignty. This rule was applied in the *Dartmouth College v. State of New Hampshire* case and the situation was exactly as if New Hampshire herself had granted the charter in 1769. The question arose as to whether this charter, granted by the British crown but now having the same status as though it had been granted by New Hampshire, was entitled to the protection of the contract clause. The law of 1816 obviously changed the charter to the disadvantage of the original trustees. If the charter was a contract, there was no question but what its obligation had been impaired by the law. Hence the question squarely before the court was, Is this charter granted by a government to a private corporation a contract? The Supreme Court decided emphatically that the charter was a contract, and that, therefore, the New Hampshire law decreasing the power of the original trustees was null and void.<sup>1</sup>

The doctrine laid down in the *Dartmouth College* case then is briefly this: a charter granted by the government to a private corporation constitutes a contract which cannot be revoked by the state. This doctrine has been followed in subsequent cases and has been widely applied by the court. This rule stands substantially now as it did in 1819 when it was first enunciated. The most noteworthy supplement to the doctrine is the rule that, in case of special grants to corporations, all such special grants shall be strictly construed. That is, whenever there is any doubt as to whether a particular right was granted, the benefit of the doubt shall be given

<sup>1</sup> *Dartmouth College v. Woodward*, 4 Wheaton 518.

to the public rather than to the corporation. This matter will be discussed in detail in a later paragraph.

As a result of the Dartmouth College case a state was powerless to revoke or materially alter a charter except in accordance with the terms of the charter. The states quite generally then adopted the practice of inserting in each charter a clause reserving to the state the right to alter or to revoke it. Before long, however, a still better expedient was used to insure control over charters in spite of the Dartmouth case. A state would, by amendment, insert in its constitution a provision that all charters thereafter granted by the state should be with the understanding that such charters might be altered or revoked at the will of the legislature. Such provisions are now very common in state constitutions. Any charter granted after the adoption of such an amendment is properly interpreted as being liable to alteration or revocation. In short, the constitutional provision is properly held to be a part of the charter. This does not mean that the doctrine of the Dartmouth College case has been abandoned. It still is the law and any charter granted without reservations in the charter itself, or without a reservation in a constitutional provision in effect when the charter is granted, is protected by the contract clause, as interpreted in the Dartmouth College case, against alteration or repeal. Most of the states, however, are careful to grant no charter except with reservations as to the right of the state to make changes. Hence, in practice, charters may be revoked or altered. It should be remembered, however, that the due process clause would prevent the arbitrary revocation of a corporation charter. If any state should revoke a charter in such a way as to take away the property of the corporation without due process, the action would be unconstitutional. The unconstitutionality would then come

from violating the due process clause rather than the contract clause. The due process clause will be further discussed in later chapters.

DOES THE CONTRACT CLAUSE PROTECT CONTRACTS WHICH ARE ALREADY EXECUTED?—A contract is said to be executed when the acts which are agreed to are performed. Suppose, for example, that A makes a contract with B agreeing to give B a piece of land in exchange for another piece of land that B possesses. The exchange is made. B has the land formerly owned by A, and A has the land formerly owned by B. The contract then becomes an executed contract. Suppose the state should then pass a law declaring the whole contract null and void, with the result that each party would have to return the land to the original owner. Such state action would be unconstitutional. The state cannot invalidate a completed or an executed contract. The contract clause protects the obligation of a contract from impairment *after* its performance as well as *before*.

The matter of an executed contract came before the Supreme Court in the case of *Fletcher v. Peck*,<sup>1</sup> which was the first case to arise under the contract clause. The legislature of Georgia gave a large land grant to a certain party. Shortly after, it was discovered that the grant had been made only through wholesale corruption and bribery in the legislature. When the truth became known, it so incensed the people of the state that in the next election a legislature was chosen which rescinded the grant. Meanwhile the recipients of the land grant had disposed of their holdings to third parties. Was the legislative act rescinding the land grant an impairment of the obligation of a contract? In order to answer this it was necessary to inquire further as to whether a grant of land already executed comes under the protec-

<sup>1</sup> 6 Cranch 87.

tion of the contract clause. Notice that here it was the rescinding Act which was attacked as unconstitutional. The Georgia legislature had the right to make land grants. The question was whether, once they were executed, the legislature could revoke the grants. The court held that the land grant was a contract, that, even though executed, it was under the protection of the contract clause, and that the rescinding act was invalid. The court also said that the bribery and corruption in connection with the grant did not give it any authority to invalidate the grant. Let us remember that it is not within the province of the court to inquire as to the honesty of legislators. That is a political question. No matter how corrupt a legislature may be, its enactments must be recognized by the courts unless they are in violation of the Constitution. This case, then, is of interest to students of constitutional law for several reasons,—first, it extends the contract clause to executed contracts; second, it was the first case in which the Supreme Court indicated that corruption in a state legislature is a political matter; and third, it was the first decisive case in which a state law was declared to be a violation of the federal Constitution.

STATE BONDS AND THE CONTRACT CLAUSE.—A state may make contracts with individuals or with other states, and the contract clause applies to both kinds of contracts. Any law repudiating its contract obligations would be unconstitutional, with one exception. The exception is as follows: A state may pass a law providing that no suit shall be brought against it. According to our constitutional theory, each state has the right to decide whether or not any individual or private organization shall bring suit against it. Suppose that the state of Ohio enters into a contract with Mr. A to build a highway for a certain amount. When the contract is

made there is a law on the statute books which allows the state to be sued. The state may at any time repeal this law, leaving Mr. A without the right to sue, and such repeal is not a violation of the contract clause. All contracts with a state are made with the understanding that no private interests have any constitutional right to bring suit against it. Bonds are issued by the state with the same understanding. It should be remembered, of course, that any state which would be lax in meeting its obligations would find that its credit would be lost. Hence, there are economic forces which might prevent a state from refusing any of its bondholders the right to bring suit against it.

Except for the principle that a state may deny to any private party or parties the right to bring suit against it, the contract clause protects those who make contracts with the state as fully as it does any form of contract. If, when bonds are issued, there is on the statute books a law providing for the levying of a tax to meet the interest and the principal of the bonds as they mature, it would be unconstitutional for the legislature to repeal this law. Such a repeal would impair the obligation of the state to meet its contract.

In case a state makes a contract with another state or with the United States, it is, of course, bound by the contract clause. It should be remembered, however, that the state is suable by another state or by the United States without its consent. This is because cases between states and cases to which the United States is a party are under federal jurisdiction. What would happen if a state should refuse to pay a judgment levied against it by a federal court is a matter of speculation. So far every state has paid all judgments rendered against it in such cases. As pointed out in an earlier chapter, West Virginia waited a long time before paying



a judgment against it in favor of Virginia, but even here no actual coercion was necessary.

**RELATIONSHIPS WHICH DO NOT COME WITHIN THE MEANING OF THE CONTRACT CLAUSE.**—When the state grants a charter to a municipality, such charter does not come under the contract clause and it may be altered or revoked without violating the federal Constitution. The state may at its pleasure withdraw any municipal charter. Of course, it often happens that the state constitution guarantees certain rights to local government units. In such cases the legislature must follow the provisions of the state constitution, but, in the absence of prohibitions in the state constitution, the legislature may alter and revoke municipal charters at will. No person holding a public office has any contractual right to the office. A person elected or appointed to any public office may be removed from office by the state legislature in spite of the contract clause. An officer or an employee of the state, however, has a right to the salary earned before his removal and any law which takes this away is an unconstitutional impairment of a contract.

Marriage contracts are not protected by the contract clause. A law weakening the marriage tie by making it easier to secure divorces applies to previous marriages as well as subsequent ones. The courts have said that marriage is a status rather than a contract and that the right of each state to regulate this status was not taken away by the clause forbidding laws which impair the obligation of contracts.

**CONTRACTS AND EMINENT DOMAIN.**—The right of eminent domain is one of the sovereign powers of government. The several state governments enjoy this right as one of the residual powers. The federal government exercises it as an implied power. By eminent domain we mean the right of the state to compel the owner of any



property to turn such property over to the government or to a public utility. It is a recognition of the fact that all property is in reality held by the consent of the government. Because of various provisions in the Constitution, principally the due process clause, the right of eminent domain is not absolute in our country. Private property can be taken by eminent domain only by giving compensation to the owners.<sup>1</sup> But the point remains that the government can compel the owner of property to sell for a fair price whenever the property is needed for a public purpose. If a state finds that a charter should be altered or revoked, but finds also that the contract clause prevents such action, the state may take the contract right away from the owner by eminent domain. Suppose that the state of Ohio had in its early history given a bridge company the exclusive right to build bridges over the Maumee River and collect tolls for their use, and that it later developed that bridges other than those of the grantee were needed. If it were impossible to so alter the charter as to allow the building of bridges by other interests because of the contract clause, it would, nevertheless, be possible for the state of Ohio to compel the holders of the charter to give up a portion of their rights if proper compensation were given. In fact, all the rights under the charter might be so taken as well as any part of them.

MAY SPECIAL PRIVILEGES BE GRANTED BY CHARTER?—Charters given to private corporations often include grants of special privileges. A public utility may be given the right to charge certain rates for service with the understanding that the state will not reduce such rates by later legislation; or a public utility, or some other corporation, may be given the exclusive right to serve certain territory. Such special privileges when

<sup>1</sup> See Chapter IX.

granted have generally been upheld. Comparatively recently, however, the courts have introduced two modifying principles: First, when any special privilege is given it must be clearly expressed. A grantee cannot imply special rights. If there is any doubt as to whether the special privilege has been given, the court decides the doubt against the corporation and denies the special privilege. Second, there are certain sovereign powers such as taxation and the police power which the state cannot permanently give away even by express grant.

HOW SPECIAL PRIVILEGES ARE CONSTRUED WHEN GRANTED IN CHARTER.—In 1785 the legislature of Massachusetts granted a charter to “the Proprietors of the Charles River Bridge” to construct and operate a toll bridge over the Charles River between Boston and Charlestown. A few years later the charter was extended for a period of seventy years. In 1828 the legislature granted a charter to “the Proprietors of the Warren Bridge” to build another bridge across the same river. The second bridge was only fifty rods from the first bridge on the Boston side, and on the Charlestown side the terminals of the bridges were only sixteen rods apart. The second bridge was to be operated as a toll bridge for six years, after which it was to become the property of the state. The owners of the Charles River bridge contended that the grant to a second company impaired the obligation of the contract which was made in the first charter. Nothing was said in the contract with the Charles River Bridge Company about the exclusive right to build and operate a toll bridge in that particular vicinity.<sup>1</sup> The company, however, argued that when the legislature gave them the right to build a bridge it thereby implied that the right was exclusive and that no competing bridge could be permitted by the

<sup>1</sup> Charles River Bridge v. Warren Bridge, 11 Peters 420.

legislature. Here was a clear-cut issue. Did the grant to build a bridge imply an exclusive grant? The Supreme Court held, when the dispute came before it, that all grants of special privilege must be strictly construed in favor of the public and against the grantee. Unless the charter to the first company clearly stated that the right was exclusive, there was no implied grant of monopoly. Hence, the Act incorporating the second and competing company did not violate the contract clause. The principles laid down in this case have always been followed by the court.

Years ago Minnesota granted a charter to the Chicago, Milwaukee and St. Paul Railway Company. The charter stated that the railway company might make needful rules and regulations concerning rates and the manner of collecting them. Later the state passed laws regulating the charges to be made by the railway. The latter contended that this was an impairment of the contract granting to the railway company complete control over rate-making. Following the principles laid down in the Charles River Bridge case, the Supreme Court said that as the complete power to fix its own rates was not clearly given to the railway by its charter, it had no legal claim to this right and that the laws regulating rates were, therefore, not in violation of the contract clause.<sup>1</sup>

Another case very much in point is that of the Northwestern Fertilizing Co. v. Hyde Park.<sup>2</sup> In 1867 the state of Illinois granted a charter to this fertilizing company to establish a plant south of Chicago for producing fertilizer from animal matter. The offal from the slaughter-houses of Chicago was transported to its plant daily. At the time when the charter was granted the territory between Chicago and the fertilizer plant

<sup>1</sup> C. M. & St. P. Ry. Co. v. Minnesota, 134 U. S. 418.

<sup>2</sup> 97 U. S. 659.

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was almost uninhabited, but in a short time the section was developed and the transporting of offal became very offensive. The village of Hyde Park, of which the section was a part, being duly authorized to do so by the state of Illinois, passed an ordinance forbidding the carriage of the slaughter-house refuse through its territory. The fertilizer company argued that the village ordinance was an impairment of its contract rights under the charter, and insisted that the grant to produce fertilizer implied the right to haul the necessary raw material. The court refused to accept this viewpoint and held that the charter did not imply the right to transport offensive matter in spite of a valid city ordinance. The following sentence from the decision in this case states the general principles very clearly: "The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown, silence is negation, and doubt is fatal to the claim. This doctrine is vital to public welfare."

In brief, then, the benefit of the doubt as to whether a special privilege is granted by charter is always given to the public. Any special grant to private interest will not be upheld by the courts unless such grant is clearly intended.

Furthermore, a special privilege cannot be transferred by the grantee to anyone else unless the charter expressly states that the privilege is transferable.

CHARTERS BY WHICH THE STATE GIVES AWAY SOVEREIGN POWERS.—When a state grants a charter and includes among its provisions an agreement to refrain from exercising any of its sovereign power, serious complication may easily arise. Suppose that a state grants an

irrevocable charter to a bank and agrees to exempt it from all taxation. Does this mean that the state must refrain permanently from exercising its sovereign power of taxation so far as this particular bank is concerned? Or suppose that a state should agree in an irrevocable charter not to regulate matters of sanitation of a given factory. Would the state be helpless in preventing unhealthful conditions in this particular plant? If a state barter away too much of its sovereignty it soon ceases to be a governing unit. It is hardly conceivable that one legislature might by contract—through charters or otherwise—prevent all future legislatures from exercising the sovereign powers which are essential to every real state.

At various times in the past the Supreme Court has upheld charter provisions in which a state has agreed to refrain from taxing or regulating the grantee. Thus in the case of *State Bank v. Knoop*<sup>1</sup> the state of Ohio was denied the right to alter the bank charter. Under the charter the state had agreed not to tax the bank, and the court held that any law levying a tax on the bank impaired the contract between it and the state. Some of the judges dissented from the opinion on the ground that the bank charter gave away the taxing power and that this was bartering away too much of the sovereignty of the state. In a few cases an express agreement to a public utility not to regulate its rates has been held to prevent any later regulation.

The extent to which any of the states have at any time bartered away their sovereign powers is comparatively insignificant. Agreeing to exempt one bank from taxation is a small matter as compared with giving away all taxing power. If any state should, even in our earliest history, have attempted to contract away its

<sup>1</sup> 16 Howard 369.



power to tax, its police power, or any other sovereign power, it is likely that the court would have held that such contracts might be altered by subsequent legislation. In fact, it is very likely that a wholesale bartering away of sovereignty would not be called a contract at all. As every student of the law of contracts realizes, no agreement is binding as a legal contract unless the parties making it are competent. If one of the parties agrees to sell something which he has no legal right to part with, or if he agrees to do something entirely outside of his legal powers, the contract is invalid. Perhaps it might be said that when the state barter away its sovereign power too freely it is in this respect no longer a competent party. Another essential of a valid contract is that it must not be against public policy. A contract between a state and a private corporation in which the former gives away sovereign powers might very easily be classed as an agreement which is clearly anti-social and against public policy, and therefore invalid.

In 1867 the state of Mississippi chartered a society for carrying on a lottery. This organization, which bore the misleading title of "The Mississippi Agricultural, Educational, and Manufacturing Aid Society," was expressly authorized to carry on the lottery for twenty-five years. Mississippi in return was to receive certain amounts from the society, including a percentage of the receipts of the lottery. Two years later a new state constitution was adopted which prohibited all lotteries, and a year later the legislature, in accord with the new constitution, passed a law making lotteries illegal. The question here was how far the state of Mississippi might go in bargaining away its police power. There was no doubt about the wording of the articles of incorporation. Unquestionably the lottery



was authorized to operate for twenty-five years. But could the legislature tie the hands of the people of Mississippi for a quarter of a century? If they should later decide to prevent lotteries in order to safeguard public morals, would they be helpless because of the provisions in the lottery charter? The matter was finally decided by the United States Supreme Court in 1880.<sup>1</sup> The court held that the state legislature had no right to contract away so much of its sovereign power. Said the court, "No legislature can bargain away the public health, or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. . . . Anyone, therefore, who accepts a lottery charter does so with the implied understanding that the people, in their sovereign capacity, and through their properly constituted agencies, may resume it at any time when the public good shall require, whether it be paid for or not. . . . It is a permit, good as against existing laws, but subject to future legislative and constitutional control and withdrawal."

In the case of *Fertilizing Co. v. Hyde Park*<sup>2</sup> the court not only denied the contentions of the Fertilizing Co. because of the lack of an express grant to transport offal, but it said further that the incorporation of a fertilizer company did not mean the exemption of such a company from all laws, local and state, which protected public health. Even though the corporation had been expressly authorized to transport offensive matter, such transportation would nevertheless be subject to reasonable police regulation.

<sup>1</sup> *Stone v. Mississippi*, 101 U. S. 814.

<sup>2</sup> 97 U. S. 659.

The state of Nebraska in granting incorporation articles to the Chicago, Burlington, and Quincy Railway Company had agreed not to compel the grantee to establish separate grade crossings. Later laws were passed compelling railroads to provide for over or under grade crossings. The railway company contended that these laws impaired the obligation of the contract between it and the state of Nebraska. The United States Supreme Court, however, held that in spite of the immunity given by the contract the legislature still had the power to regulate grade crossings in the interest of public safety.<sup>1</sup> Here was another instance of the bargaining away of police power which the court felt was going too far toward weakening the sovereignty of the state.

When it comes to grants giving public utilities complete power over rate-making the court has been more inclined to hold the agreement binding. The right to fix rates is a part of the police power, but up to the present at least the court has not held rate-fixing to be as important as regulations for public health, morals, and safety. Nevertheless, many students of constitutional law feel that no state legislature should barter away the right of future legislatures to regulate public utility rates. As the place of the public utility assumes greater and greater importance in the daily life of the American people, it would not be surprising if the Supreme Courts should begin to favor the view that the right to fix rates is so fundamentally a part of the police power that the state must not part with it even by contract.

The right of eminent domain cannot be bargained away, for it, too, is one of the sovereign powers of the

<sup>1</sup> *Chicago, Burlington and Quincy Railroad Company v. U. S.*, 170 U. S. 57.

state. Some time ago the state of Pennsylvania made a contract with the authorities of a hospital agreeing that no streets should be opened through the hospital grounds without the consent of the hospital authorities. This agreement did not prevent the state later from taking the land belonging to the hospital for streets when the public interests demanded the opening of new streets.<sup>1</sup> Hence, all charters and other contracts made by the state are with the understanding that the state continues to hold the right of eminent domain.

We might summarize the constitutional law relating to charters in which the state bargains away sovereign powers as follows:

(1) Charters expressly granting tax exemption have been held valid, but wholesale and general tax exemption would no doubt be held not to be binding as against future legislation.

(2) In spite of agreements to refrain from regulating in the interests of public health, morals, and safety, the state may exercise such regulatory powers in these fields as public interest demands.

(3) No charter or contract entered into by the state can interfere with the right of the state subsequently to exercise the right of eminent domain.

(4) In the field of public-utility rate regulation it is possible for the state by charter to give away for a time at least the power to fix rates. Perhaps an unlimited and extravagant granting of such power would not be held binding. Up to the present, however, every charter which clearly and expressly gives the corporation the right to fix its own rates has been upheld, and any subsequent legislation interfering with this right has been declared a violation of the contract clause.

In this discussion of the contract clause and sovereign

<sup>1</sup> *Pennsylvania Hospital v. Philadelphia*, 245 U. S. 20.

powers we have assumed that the charters and grants were irrevocable, as was the case with the charter granted to Dartmouth College. It must be kept clearly in mind that most states now reserve the right—either by constitutional provision or by the provisions of the charter itself—to modify or repeal all corporate charters. Whenever such reservations exist the state is not bound by the contract clause. Of course, any arbitrary revocation which interferes with property rights may violate the due-process clause, but when the state reserves the power to amend or repeal, it is as though the contract clause did not exist so far as the charters involved are concerned.

ARE CONTRACTS BETWEEN PRIVATE INDIVIDUALS SUBJECT TO THE POLICE POWER?—Much of the discussion in this chapter has dealt with contracts between the state and private parties. This is not strange, because most of the litigation under the contract clause has arisen in connection with grants made by the state to private corporations. As indicated in the early part of the chapter, the state may pass no law which renders it more difficult to enforce the contract than it was when the contract was made. But suppose the state passes a law which, while it is not directed particularly at any type of contract, nevertheless regulates individual conduct in such a way as to make certain types of contracts virtually impossible of enforcement. In other words, may the state enact and enforce regulations in the interest of public welfare when such regulations materially interfere with private contracts already entered into? In answer to this it may be said emphatically that private individuals cannot by contract exempt themselves from future legislation. Obviously, a contract between two street-railway companies to charge a given fare would not keep the state from compelling them

to charge a different one. Suppose that a person agrees to act as the salesman for a local tobacco firm. This contract would be interfered with most decidedly if the state should prohibit the sale of tobacco in the state. The prohibition of tobacco, however, would not in any sense violate the contract clause, even though one of its immediate results may be practically to nullify certain types of contracts. It is a settled rule of constitutional law that no contracts entered into between individuals free the parties to it from the effects of any subsequent legislation regulating public health, morals, safety, or general welfare.

MAY THE OBLIGATION OF A CONTRACT BE INCREASED?—Any law passed which makes it easier to enforce a contract already made is not in violation of the contract clause. If a contract entered into in good faith is found to be void, the legislature may pass a law making it valid. Such legislation does not impair the contract. Rather it has the opposite effect.

If the legislature passes a law providing a more effective means of securing damages in case of breach of contract, such a law would apply to contracts already made as well as to those subsequently entered into. Making the remedy more effective increases rather than impairs the obligation of contract and is not a violation of the contract clause.

## CHAPTER VIII

### HOW PERSONAL RIGHTS ARE SAFEGUARDED

THE Constitution contains a large number of provisions, the purpose of which is to safeguard the rights of private persons against unwarranted intrusion by the government. Some of the prohibitions are directed against the federal government and others against the states. Some, but not all, of the prohibitions against the United States are repeated in precisely the same language in the list of prohibitions against the several states. In order to simplify matters we shall take up first the provisions which are directed against the federal government.

SAFEGUARDS AGAINST FEDERAL INTERFERENCE.—Most of the prohibitions protecting personal rights against federal interference are found in the amendments rather than in the original Constitution. There are only three such limitations upon Congress in the Constitution as first adopted. (We are discussing only safeguards for personal rights at this point. There are, of course, many limitations of other types, such as the prohibition against levying an export tax, for example, but these are discussed elsewhere.) The three prohibitions in the original Constitution are all found in Section 9 of Article I: (1) The privilege of writ of habeas corpus shall not be suspended unless, when in cases of rebellion or invasion the public safety may require it. (2) No bill of attainder, or (3) *ex post facto* law shall be passed. In addition to these three limitations there is the provision in Section 2 of Article III that "the trial of all



crimes, except in cases of impeachment, shall be by jury" and "in the state where said crimes have been committed." As this provision is further emphasized by the Sixth Amendment, it will be discussed in connection with the Amendments rather than at this point.

WRIT OF HABEAS CORPUS.—The purpose of the writ of *habeas corpus* is to free those who are imprisoned without sufficient cause. This writ has always been looked upon as a most important safeguard against arbitrary or illegal imprisonment. The privilege of this writ may never be suspended except when military exigencies make it necessary. There has been some difference of opinion as to what branch of the government may suspend this privilege during time of war. Some students of government have felt that the President as commander-in-chief should have this power. The courts, however, have agreed with those who say that, as this limitation is listed among the prohibitions against Congress, it is fair to assume that the framers of the Constitution intended that Congress, and not the President, should have the power of suspension. In the case of *Ex Parte Milligan*<sup>1</sup> President Lincoln had been given the power of suspending the privilege whenever in his judgment the public safety required it. Pursuant to this law, Lincoln suspended the writ in Indiana outside of the actual war zone on the ground that military necessity demanded it. The Supreme Court said that the suspension so far away from the scene of actual hostilities was unconstitutional. A majority of the court pointed out that the successful prosecution of the war might make such suspension necessary even outside the war zone. Some of the best constitutional lawyers agree with the minority. All are agreed, however, that the President has no legal right to suspend this great priv-

<sup>1</sup> 4 Wallace 115.

ilege unless authorized to do so by Congress. This possible suspension of the privilege of the writ of *habeas corpus* is the nearest we come in the United States to the practice which is known in many countries as "the suspension of constitutional guarantees" and in South America as "the state of siege." There can be no wholesale legal suspension of guarantees in our country even in time of war. This is fortunate because the stability of our guarantees prevents war hysteria from interfering unduly with personal rights.

The suspension of the privilege does not suspend the writ. It merely makes it unnecessary for a court to issue such a writ unless it so desires. In ordinary times the court must issue the writ so that a hearing may be held as to the validity of the prisoner's detention. After the privilege is suspended because of military necessity the court may use its discretion in the matter.

This limitation is upon Congress only and not upon the state legislatures. Any state may suspend the writ, although any arbitrary denial of the personal rights may be in violation of the due process clause and may be invalid for this reason. Most state constitutions, however, prohibit legislative interference with the writ of *habeas corpus* in emergencies.

**BILL OF ATTAINDER.**—A bill of attainder is a law which inflicts punishment without judicial trial. In earlier times a bill of attainder was a law condemning a person to death without a trial, while a law which provided for fines and imprisonment or other forms of punishment without a trial was called a "bill of forms and penalties." Both of these concepts are included under the term "bill of attainder" as used in our Constitution.

In 1865 Congress passed a law providing that no person would be permitted to appear as an attorney before the federal courts unless he would take an oath that he

had not in any way aided the Confederate cause. The Supreme Court held this to be a bill of attainder and hence unconstitutional.<sup>1</sup> Here was a case of a punishment meted out without the privilege of a court hearing. This law was objectionable also because it applied to past rather than future, and so partook of the nature of an *ex post facto* law. The several states also are prohibited from passing bills of attainder. The rule against *ex post facto* laws also applies to the state legislatures.

EX POST FACTO LAWS.—*Ex post facto* laws should be distinguished from other retroactive legislation. A retroactive law is one which applies to acts committed before the passage of the law. A law is not unconstitutional merely because it is retroactive. In fact, some retroactive laws are not only valid, but are highly desirable. A law covering a defect in a title to a piece of land already sold is a good example. A law is *ex post facto*, and therefore unconstitutional, which, first, *makes an act a crime which was not a crime when the act was committed*. Such acts committed in the future are, of course, criminal, but the passage of the law does not affect past acts. Second, *inflicts a greater punishment than was attached to the crime when it was committed*. Thus a law increasing the punishment for counterfeiting does not apply to acts already committed. It is entirely proper, however, for Congress to decrease the punishment and to provide that the milder punishment shall apply also to past crimes for which sentences have not been given. An interesting case came up in the highest New York court for the decision of which the court has been criticized. The legislature of the state changed the punishment for second-degree murder from the death penalty to life imprisonment. The New York court was asked to apply this to a case where the murder had been

<sup>1</sup> Ex Parte Garland, 4 Wallace 333.

committed before the change in penalty was enacted. The question arose whether this was an increase in punishment. The court held that this was an *ex post facto* law.<sup>1</sup> The judges said that they were unable to determine that life imprisonment is less severe than the death penalty. The courts of other states, however, have held that the death penalty is always the extreme penalty and that any substitute for it means a milder punishment, and that, therefore, it cannot be *ex post facto*. A law which provides that a condemned prisoner shall be kept in solitary confinement is *ex post facto* when it is applied to acts committed before the law is passed. Frequently laws are passed which provide for a more severe punishment for the second offense. Is such a law *ex post facto* when it applies to cases where the first offense was committed before its passage? Is this an increased punishment based on acts which are in the past? The courts have held that such laws do not add to the penalty of the first offense and may therefore apply to all second offenses committed after the law is passed, even though the first offense was committed before that date.

Third, *makes it easier to convict the person accused of a crime than it was at the time when the act was committed*. Suppose that a man operates a counterfeiting outfit in his wife's presence, knowing that according to the laws of procedure a wife cannot be compelled to testify against her husband. Let us suppose further that the law is changed so that a wife's testimony is taken. The new law relating to testimony would not apply in case the counterfeiter is tried for acts committed before this law was enacted. The use of such testimony would make it easier to convict than it would have been under the old rule, and therefore the new law

<sup>1</sup> *Shepherd v. People*, 25 N. Y. 406.

is *ex post facto* and unconstitutional when applied to past offenses. The state of Utah passed a law changing the number of persons required for a jury from twelve to eight. Is it easier to convict a man with a jury of eight than with a jury of twelve? If so, the law reducing the size of the jury would be unconstitutional as applying to trials for offenses committed before the law went into effect. The question was brought before the Supreme Court in the case of *Thompson v. Utah*.<sup>1</sup> The law was held to be *ex post facto* as applied to past offenses. A unanimous jury is needed to convict, and it would, no doubt, be easier for the prosecutors to convince eight men of a person's guilt than twelve. It is not unconstitutional, however, to change the place of trial for past crimes. Neither does the *ex post facto* provision keep Congress or a state legislature from changing the number of judges or from providing different qualifications for jurors in connection with trials for past offenses.

All laws which have been classified as unconstitutional under this head are so *only as they are retroactive*. Changes in criminal law which add to the list of crimes, increase punishment, or make it easier to convict, are, of course, all constitutional as far as they apply to offenses committed in the *future*, unless it happens that they violate some other constitutional provision, such as, for example, the due process clause.

An *ex post facto* law, in short, is a criminal law which in any way works to the disadvantage of any person committing, or accused of committing, a crime before the law is enacted.

THE FIRST TEN AMENDMENTS.—The first ten amendments were added to the Constitution as a reaction to the feeling that the original document as drafted by the

<sup>1</sup> 170 U. S. 343.



Philadelphia convention had created a central government with too much power. The leaders in many of the states were fearful of the super-state which had been brought forth, and to placate them a list of prohibitions was added in the form of amendments. This list of prohibitions is often referred to as a bill of rights.

It is highly important to keep constantly in mind that the first ten amendments are *not* directed against the *state* governments. Superficial students of the Constitution sometimes place themselves in a ludicrous position by quoting these amendments as a limitation upon state action. No state law can violate the due process clause in the Fifth Amendment, for that clause is directed only against Congress. It happens that the Fourteenth Amendment, adopted over three-quarters of a century later, directs the same prohibition against the states, but to quote the Fifth Amendment in challenging a state law shows at once a sad lack of knowledge of the scope of the first ten amendments. The first ten amendments, then, are "don't signs" only as far as the United States is concerned. It is only actions by the federal government which are "*verboden*." Many of the state constitutions also contain bills of rights. Frequently these are taken verbatim from the federal Bill of Rights. When this is the case it means that the state legislature is prohibited from doing some of the very things which are also forbidden to Congress. The limitations upon the state legislature, however, are then matters of state constitutional law and are not within the scope of our discussion. If the state of Ohio, for example, passes a law providing for cruel and unusual punishment, such a law would be invalid not because of conflict with the Eighth Amendment, but because the Ohio constitution prohibits such punishments.

The prohibitions against the federal government found



in the first ten amendments may be divided into two classes—(1) those which protect persons accused of crime and, (2) guarantees of religious, political, and other personal rights.

**PROTECTIONS OF PERSONS ACCUSED OF CRIME.**—In addition to the safeguards in the first ten amendments there are, as we have already seen, other guarantees for those accused of crime. These guarantees—relating to habeas corpus, bill of attainder, and *ex post facto* law—should be, of course, listed among the constitutional rights of persons accused of crime, even though they happen to appear in the original document rather than in the amendments.

**TRIAL BY JURY.**—Trial by jury is guaranteed by the original Constitution as well as by the Sixth Amendment. These provisions relate to criminal cases. The Seventh Amendment further provides that in all civil suits involving more than twenty dollars a jury trial must be granted. These guarantees, of course, apply only to cases in the federal courts.

These guarantees cover misdemeanors of a more serious nature as well as felonies. A felony is usually defined as an offense which is punishable by imprisonment in a penitentiary or by the death penalty. All other crimes may be classed as misdemeanors. All felonies committed against the United States are punishable only after trial by jury. Persons tried for misdemeanors also are, in general, entitled to a jury trial. Petty offenders, however, such as, for example, persons accused of exceeding the speed limit in the District of Columbia, are not entitled to jury trial unless the fines imposed are heavy.

When a person refuses to appear after a subpoena has been served, or to answer questions in court, or in any other way to show his lack of proper respect for the

court, he is said to be in contempt of court. Such a person may be punished by the court without a jury trial. In other words, the trial for contempt of court is not a criminal prosecution in the sense that the words are used in the Constitution. Neither is an alien living in this country entitled to a jury trial to determine whether or not he is to be deported. On all other questions, however, except that involving his right to remain under American jurisdiction, an alien is entitled to a jury trial to exactly the same extent as is a citizen.

The word jury means a group of twelve men. If Congress should pass a law providing for a jury of a different size the law would be unconstitutional as taking away the right of trial by jury. The word is taken to mean exactly what it meant in Colonial and English law at the time the Constitution was drafted. This not only makes it imperative to have twelve jurors, but it carries with it the requirement that the verdict of a jury must be unanimous. A federal law providing for conviction by less than all the jurors would be invalid.

This interpretation applies only to federal juries. There is nothing in the Constitution of the United States which prevents a state from changing the size of a jury or to make a different rule as to how many of the jurors are necessary to convict. Perhaps a state may even abolish the jury system altogether. The question of the general abolition of the jury by a state has not come before the Supreme Court. No state has, up to the present, taken such extreme action. The only possible provision which might make it unconstitutional for a state to abolish the jury system is the due process clause of the Fourteenth Amendment. Does due process include a jury trial? For reasons that will be brought out later in this chapter, it is very likely that it does not.

**PLACE OF TRIAL.**—The framers of the Constitution showed their appreciation of the advantage to the accused of being tried in the locality where the crime was committed. This may seem like a doubtful privilege, as the heinous nature of a crime may be more clearly realized locally. On the other hand, it is unfair to compel an accused man to defend himself in a far country unless his alleged offense is also localized there. The original Constitution provides that trial for crimes shall be held in the state in which the crimes are committed. The Sixth Amendment goes still farther, requiring that the trial must be in the “state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.” Pursuant to this provision, and as a part of the power to organize the judiciary, Congress has divided the country into judicial districts. Offenses committed in more than one district may be tried in any of the districts involved. A person charged with using the mail for illegal purposes may be tried in the district where the forbidden material was mailed or in that in which it was received. Offenses committed on the high seas are tried wherever Congress may decide.

**INDICTMENT OF GRAND JURY.**—An indictment is a formal accusation. There are two forms of indictment under the common law. One is by information where the formal accusation is made by the prosecuting attorney. The second is by presentment or indictment of a grand jury made up of twenty-four men. The indictment of a grand jury is guaranteed only in cases involving “a capital or otherwise infamous crime.” When the punishment is death it is a capital crime. A crime is considered infamous when it is punishable by imprisonment in a penitentiary for at least a year. A shorter term at hard labor would perhaps be held to be infamous

also. A crime punishable by whipping would probably be classed as infamous. The precise meaning of the term infamous changes with public opinion, but it is settled that a penitentiary term of a year or more is infamous punishment.

The guarantee of indictment of a grand jury applies to resident aliens also. While an alien may be deported without a trial, he may not be tried for an infamous crime against the United States unless a grand jury brings the indictment. The right of indictment of a grand jury is a formal guarantee rather than a fundamental one. Therefore, it does not apply to territories such as Hawaii and the Philippines, where the cultural background is different from that of our own. The guarantee does not apply to cases arising from the "land and naval forces." The constitution specifically excepts such cases.

This guarantee, like all the others in the first ten amendments, is directed only at the federal courts. Many of the states have abolished grand jury as a part of their judicial machinery.

**SPEEDY AND PUBLIC TRIAL.**—The Sixth Amendment requires that all criminal trials in the federal courts must be "speedy and public." The speed must be reasonable. The trial, however, need not be carried on with such rapidity as to interfere with proper procedure. A person has no right to complain that a postponed trial is not speedy unless he makes objection when the postponement is first made. He cannot wait until the postponed trial is over and then claim that the decision is unconstitutional because of lack of speed.

The Supreme Court, so far, has not been called upon to make an interpretation of the phrase "public trial." The question has been raised at times in the lower federal courts, but in no case has an appeal been taken to

the Supreme Court. In a train robbery case the judge ordered that all persons except lawyers, reporters, and relatives leave the court room. The purpose of this order was to relieve the crowded condition of the court room. The circuit court of appeals, when the case was brought before it in 1917, held that this was not a public trial. It is not unlikely that the Supreme Court would have reversed this decision. It would seem that the admission of relatives, reporters, and counsel would secure all the advantages of a public trial.

Four years earlier in another circuit it was decided that an order clearing the court room of all spectators except those connected with the trial was valid in a trial for rape. Here even relatives were excluded. This decision would, in all probability, be upheld by the Supreme Court. The court has authority to exclude the general public in the interests of decency. It also has the right to expel an audience which refuses to be orderly and respectful.

**SELF-INCRIMINATION.**—A most important guarantee is that found in the Fifth Amendment, which states that “no person . . . shall be compelled in any criminal case to be a witness against himself.” This provision applies to all witnesses in a case as well as the person on trial. Any person testifying before a court may refuse to answer a question on the ground that his statement renders him liable to criminal prosecution.

This guarantee, of course, applies with full force to the defendant in the case. If he is compelled to produce papers which may be used against him, such compulsion is unconstitutional. Neither can the accused be compelled to uncover portions of his body for purposes of identification. No doubt it would be an unconstitutional procedure to compel him to make fingerprints. As a matter of fact, fingerprints are usually secured surrep-



titiously. Third-degree methods are likely to be illegal, but a written confession obtained under duress outside of court can be presented as evidence against an accused person.

Some years ago the Tennessee supreme court had a case before it where the defendant was asked to make a footprint in a container filled with mud to compare such footprint with one found near the scene of the crime. The Tennessee constitution forbids self-incrimination in that state. The court held that the making of the footprint by the accused constituted giving evidence against himself.<sup>1</sup> The comparison of the face of the accused with a photograph is not self-incrimination. Perhaps trying clothing on the accused would not be a violation of this constitutional right.

The protection against self-incrimination does not include the right to refuse to make statements which will incriminate others. The protection is entirely personal. A statement must be made regardless of the fact that it will incriminate third parties, as long as the person testifying is not himself incriminated. An officer of a corporation cannot refuse to testify even though the corporation is made liable to criminal prosecution as a result of his testimony. He can refuse to answer only on the basis that he, personally, is made liable to prosecution. Thus, an officer or an agent of a corporation may be compelled to testify against the corporation, and to produce papers which may be used as evidence against it. In the same way the agent of a private individual may be compelled to testify against his principal.

No person may refuse to testify unless such testimony can be used for purposes of convicting him of criminal action. He cannot use this guarantee to protect himself from making statements that will bring him

<sup>1</sup> *Stokes v. State*, 5 Baxt. (Tenn.) 619.



disgrace or public contempt, or which will show him to be a dishonest person. If the criminal law should provide that no one should be punished for counterfeiting, for example, unless found guilty within ten years after the act was committed, a statement by a witness that he had made counterfeit money more than ten years ago would not make him liable to prosecution and he may be compelled to testify regarding such activities.

Because of the constitutional guarantee against self-incrimination, Congress has passed what are known as immunity statutes. These provide that no witness shall be prosecuted because of any testimony or evidence which he may bring before a court. When such statutes are in force it enables the court to compel answers to all questions, even though a witness may make statements which clearly show him to be guilty of criminal acts. He is immune against prosecution and hence cannot plead any right to refuse to answer. The immunity offered by federal statute does not include immunity against state prosecution. A witness may be compelled to testify in a federal court under cover of the immunity statutes, and yet be liable for prosecution in a state court if his testimony incriminates him in relation to state laws. Conversely, if a state constitution prohibits self-incrimination in the state courts, a state immunity statute would free a witness from state prosecution and would compel him to answer all questions, but would leave the witness liable to any use which a federal court might later make of the evidence presented. Under such circumstances he would be liable also to prosecution in the courts of other states. In other words, the immunity offered to those who give evidence which may be used against them does not extend beyond the jurisdiction of the government which grants it.

Many state constitutions contain provisions protecting

witnesses against self-incrimination. Unless there is such a guarantee in the state constitution there is nothing to prevent the state legislature from enacting legislation which compels the defendant as well as other witnesses from giving self-incriminating evidence. The only question might arise as to whether the due process clause of the Fourteenth Amendment includes protection against self-incrimination. No state may deprive a person of life, liberty, or property *without due process*. Is there a lack of due process when a witness is compelled to testify against himself? This matter was brought before the Supreme Court in the case of *Twinning v. New Jersey*.<sup>1</sup> It was held that due process did not include the guarantee against self-incrimination. That is, if a state compels self-incriminating testimony it does not thereby violate the due-process clause. We shall hear more about the due process clause later in this chapter.

**UNREASONABLE SEARCHES AND SEIZURES.**—This guarantee protects everyone regardless of whether he is accused of crime. To search and seize a man's private papers so as to use them for evidence against him in a criminal case would not only be an unreasonable search and seizure, but it would also be unconstitutional because it would compel him to testify against himself.

This guarantee protects a person against any intrusion upon the privacy of his home or his person, except by a public officer who has a search warrant. The Supreme Court has said that the protection also extends to mail, which may not be opened and searched.

A great deal of attention has been given to this clause since the adoption of the Eighteenth Amendment. Does the enforcement of prohibition justify an officer in searching private premises without a warrant? Con-

<sup>1</sup> 211 U. S. 78.

gress is authorized by the Eighteenth Amendment to enforce prohibition by appropriate legislation. Might not this be interpreted to mean that in case of conflict between the Eighteenth Amendment and the Fourth (prohibiting unreasonable searches and seizures) the later amendment should take precedence? The Supreme Court, however, has insisted that search warrants are necessary in order to search private premises for liquor. Automobiles, however, may be searched without a warrant if there is reason to believe that they contain liquor. Neither is a warrant necessary to search an open field in order to locate contraband liquor.

Strange as it may seem, it is entirely legal to use as evidence against a man any papers or other material which have been stolen from his premises by a private citizen and then turned over to the prosecuting attorney. If a public officer makes the entry it is unconstitutional, but if some other person commits burglary or theft in order to get certain papers, said papers are admissible as evidence. Of course, the person who makes the illegal entry renders himself liable to punishment for whatever criminal acts he may have performed, but this does not prevent the use of the evidence which has been dishonestly—though not unconstitutionally—secured.

**DOUBLE JEOPARDY.**—The Fifth Amendment contains the following provision: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." This means in the first place that no person may be punished twice for the same offense. But it goes still farther and prevents any person from being tried more than once for the same offense.

It should be clearly borne in mind, however, that this applies only in the federal jurisdiction. If a person commits an act which violates both federal and state law at the same time, there are two offenses, even though

there is but one act. Suppose that A sells packages of cigarettes without the federal revenue stamp in a state which prohibits their sale altogether. A breaks two laws. If he is tried and punished under the state law he may again be tried and punished by the federal government without violating the double jeopardy clause. In many state constitutions there is a guarantee against double jeopardy. This guarantee will not prevent a man from being tried for an offense against the state even though he has already been tried for the same act by the federal government or by another state. The jeopardy must come twice from the same government in order to violate the constitutional guarantee. Of course, only federal interference is prohibited by the Fifth Amendment.

Sometimes the same act may constitute two separate offenses even in the same jurisdiction. A man may violate an ordinance against speeding as well as one against disobeying a traffic officer at the same time. A provision in the constitution against double jeopardy would not keep the man from being punished twice for the same act in cases where there are two separate offenses. Suppose that Mr. A sends a counterfeit bill through the mails. If there is a law against passing counterfeit money and another against using the mails fraudulently, he may be tried twice in spite of the double jeopardy clause. In general, however, one act does not constitute two offenses. Frequently a man is guilty of one or the other of two offenses. A person cannot be guilty of murder and manslaughter at the same time for killing one person. If he were tried for both he would be put in double jeopardy for the same offense.

If a person is tried for an offense and acquitted, he cannot be tried again, because of the double jeopardy clause. If he is convicted he may appeal to a higher

court, but if he is acquitted it is unconstitutional for those who are prosecuting him to take the case to a higher court. In other words, a conviction does not settle the matter until the highest court has heard the case. On the other hand, an acquittal in the lowest court is final because another trial means double jeopardy. If the jury disagrees in a case it is not double jeopardy to try it over again with another jury. This is properly considered a continuation of the original trial.

**EXCESSIVE BAILS AND FINES.**—The prohibition against excessive bails and fines in the Eighth Amendment does not apply, of course, to the states. At the same time many state constitutions contain similar provisions. If a state should, however, levy an excessive fine it would probably be unconstitutional as taking property without due process. This guarantee is directed not only against the courts and the executive officers, but against Congress as well. Any law providing for excessive bails or fines would be unconstitutional. The amount of bail which is not excessive depends on two things—(1) the ability of the accused person to furnish bail, and (2) upon the seriousness of the offense.

A fine out of all proportion to the offense would be invalid. For example, a fine of ten dollars for picking flowers in a public park might be excessive if a person picking ten flowers is held to be liable to ten fines. On the other hand, the Supreme Court upheld a law of Congress which prohibited the use of mail for fraudulent purposes and which specifically made the mailing of each letter a separate offense.

**CRUEL AND UNUSUAL PUNISHMENTS.**—This, too, is directed only at the federal government, but many state constitutions contain the same words as a limitation upon the state legislature. Of course the due process



clause of the Fourteenth Amendment would keep the states from arbitrary action in criminal cases.

Any punishment which is entirely out of proportion to the offense is cruel and unusual. Capital punishment by electrocution has been declared by the Supreme Court not to be cruel in the constitutional sense.<sup>1</sup> The definition of cruel and unusual punishment does not depend on public opinion at the time of the adoption of the Eighth Amendment. It depends upon public opinion at the time the case arises. It is conceivable that punishments now inflicted may, as we become more humane, be declared cruel and unusual.

MISCELLANEOUS SAFEGUARDS OF ACCUSED PERSONS.—In addition to the guarantees already discussed and the very important due process clause to be discussed later, there are four other rights of accused persons protected by the Constitution against federal intrusion. All of them are found in the Sixth Amendment. They are: First, the accused must be informed of the nature of the charge against him. Second, he has a right to confront the witnesses against him. There are a few exceptions to this rule. Dying declarations may be admitted. This was the practice before the adoption of the Constitution. The rule does not apply to cases of contempt of court. Neither is the accused entitled to meet witnesses who appeared against him before a grand jury but not at the trial, nor even to know their names. Third, to have compulsory process for bringing witnesses in his favor into court. Fourth, to have a counsel for his defense.

DUE PROCESS.—The due process clause has already been mentioned a great many times in this volume. The interpretation of the terms "due process" has received more time and attention from the Supreme Court than any other clause in the Constitution. The clause appears

<sup>1</sup>*In re Kemmler*, 136 U. S. 436.



twice, first in the Fifth Amendment—directed against the federal—which provides that “no person shall be . . . deprived of life, liberty, or property without due process of law”; and second in the Fourteenth Amendment, which directs the same prohibition against the several states. Thus the due process clause is a safeguard against state interference with personal and property rights, as well as against federal intrusion.

As originally used in England, due process meant “the law of the land.” Under this interpretation, any law passed by a legislative body is due process, and the limitation would be only upon the executive and judicial officers of the government. But the clause has a wider application in our American jurisprudence. It is a limitation also upon legislative action. A law which takes life, liberty, or property without due process is unconstitutional.

What is due process? This is the most difficult question in the whole field of constitutional law. No complete and exhaustive answer has ever been given. The clause is still being interpreted by the courts. Obviously it would be foolish for us to try to formulate a clear-cut definition. Nevertheless, it is possible to make a number of statements about due process which throw some light on the problems involved. There are a number of essentials of due process which might be mentioned. First, there is jurisdiction. No governmental act is due process if it reaches beyond its jurisdiction. Second, there must be notice given to the person who is to be deprived of life, liberty, or property. This need not always be personal. The enactment of a tax law is notice to all taxpayers that a law will be levied. Third, there must be an opportunity to be heard, not necessarily in court, although a court hearing is sometimes required (always in criminal matters). Fourth, there must be no unfair discrimina-

tion between persons. It is at this point that the due process clause overlaps, as far as the states are concerned, with the provision of the Fourteenth Amendment that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The government may take life, liberty, or property. It has taken these since governments began and no doubt will continue to do so. In America, however, they can be taken only with due process.

When we speak of life we mean the right to retain all parts of the body, and the legal use of organs and limbs, as well as mere physical existence. It is easy to see that life overlaps with liberty. By liberty we mean not only freedom to come and go, but the right to engage in occupation, to make contracts, and to engage in all lawful activities. The problems arising under this head are discussed elsewhere, but mainly under the chapter on police powers (see Chapter XI).

The right of property is closely allied to liberty. It includes the right to use property for any proper purpose and to acquire it in any legitimate way. The government may take property in various ways. Usually it is taken through taxation or through the right of eminent domain. In all cases property must be taken only by due process. What is due process in regard to taxation is fully discussed in Chapter X, while Chapter IX is devoted largely to a consideration of the effect of the due process clause upon the right of eminent domain.

**DUE PROCESS AS A PROCEDURAL RIGHT.**—Not only does the due process clause guarantee personal and property rights—not only does it protect life, liberty, and property as such—but it also includes guarantees that certain procedure shall be followed. It is difficult to draw an exact line between constitutional and unconstitutional procedure. In general, however, it can be said that any

procedure which provides notice and hearing is considered due process. If the hearing involves criminal matters it must be in court, but it probably need not be a jury trial to be due process. A jury trial for federal crime, however, is guaranteed by the Sixth Amendment. Just what kind of hearing is required varies with the circumstances and in general it must be in accord with settled usage. It is not necessary, however, to stick to the usage of the time when the Constitution was framed. Then, too, the court or administrative officer in charge of proceedings must have jurisdiction, otherwise it is not due process.

**DUE PROCESS IN CRIMINAL TRIALS.**—It seems from the decisions of the courts that due process is observed in criminal trials if (1) the court has jurisdiction, (2) if accused has notice of charge, (3) if he is given a fair trial before an impartial court. The long list of safeguards for accused persons enumerated in the first eight amendments are not necessary for due process. It is fair to assume that those who drafted these amendments felt that due process did not include all of these. They felt that it was necessary to add the due process clause in the Fifth Amendment along with other guarantees. At any rate, the due process clause in the Fourteenth Amendment does not make it necessary for the several states to observe the provisions of the first eight amendments. Indictment of grand jury, prohibition of self-incrimination, confrontation of witnesses—none of these are required by the due process clause. Although there has been no decision on this point, it is likely that a state law abolishing the jury in criminal trials would not be held a violation of the due process clause.

**RELIGIOUS LIBERTY.**—The First Amendment states that "Congress shall make no law respecting an establishment of religion or prohibit the free exercise thereof." Like

all other prohibitions in the first ten amendments, this does not extend to the states. Many states have included a similar provision in the state constitution, but that is a different matter. Furthermore, any arbitrary discrimination against any form of religious worship would probably be unconstitutional because of the due process clause.

This guarantee does not prevent Congress from prohibiting practices which are opposed to public policy, even though such practices are followed because of religious belief. Thus, a law prohibiting polygamy is not an interference with the free exercise of religion even though the tenets of a sect commend polygamous marriages. Laws against blasphemy, as well as those providing for Sabbath observance, are valid. When in 1917 Congress passed the draft law, it exempted from the draft members of any sect which made participation in warfare wrong. This law was attacked as a violation of the First Amendment. The Supreme Court held, however, that such discrimination did not violate the First Amendment. Neither was the exemption of clergymen and theological students such a violation. It is unconstitutional, however, to require any religious test as a qualification for public office.

**FREEDOM OF SPEECH AND OF THE PRESS.**—Another provision found in the First Amendment is that "Congress shall make no law . . . abridging the freedom of speech or of the press." The supporters of the Constitution maintained that this limitation was unnecessary. In their opinion the federal government had no power over speech or the press. The critics of the new government replied that while this was true, they felt it was necessary to protect the individual against abuse of federal power. As a matter of fact, the federal government has implied power to interfere with the complete freedom of

expression whenever it is necessary in order to carry out any of its express powers. Whenever any utterances or publications are of such a nature as to seriously interfere with any of the functions of government it is constitutional to make such expressions criminal. The difficulty lies in locating the boundary between expressions which are so dangerous as to warrant restrictions and those which are not. It has always been recognized that any expressions which defame character are subject to governmental restrictions regardless of the guarantees of the First Amendment. In time of war it is legitimate to punish those who write and speak in such a way as to materially and directly obstruct the conduct of the war.

It is in time of war, particularly, that the more difficult problems involving freedom of speech arise. There are those who say that the limitation upon congressional action is absolute and that even in time of war there can be no abridgment whatever of free speech. Others go to the opposite extreme and say that in time of war there are no restrictions of any sort on Congress and that therefore it may make whatever restrictions it pleases on speech and the press. Both these extremes are, of course, incorrect, although we have been moving considerably toward the second. In theory the First Amendment, like all other guaranties, holds in war as in peace. War, however, naturally brings about conditions under which it may be necessary, in the interest of public welfare, to curb freedom of expression more than in times of peace.

Any utterance which conveys false reports intended to interfere with military or naval operations, or which intentionally causes insubordination in the army or obstructs recruiting, can constitutionally be forbidden. The Espionage Act of 1917 was for this purpose. In 1918 the scope of the Act was broadened and some of the added



provisions were vigorously attacked by many students of constitutional law as infringements upon the freedom of speech. The part which received the most criticism was that which made it criminal during the war to utter any words which would bring the form of government of the United States into "contempt, scorn, contumely, or disrepute." Many people felt that this was going too far in the direction of muzzling critics of the government. Several persons were tried and convicted under the amended Espionage Act. In no case, however, was it necessary for the Supreme Court to pass directly on the constitutionality of the more objectionable provisions. The act in general was recognized as valid.

It should be noted that utterances are criminal under the Espionage Act only when made with the intent to accomplish the thing prohibited. The court was inclined, however, to allow punishment for words uttered without evil intent. This has been looked upon by many as a procedure highly antagonistic to American political ideals. In truth, the First Amendment afforded much less protection against governmental interference with free speech than writers on constitutional law had anticipated. It is doubtful whether the most careful student of American constitutional history would have prophesied the extent to which our freedom of speech and press was interfered with during the World War.

There are two ways of interfering with freedom of speech. The first is what may be called previous restraint. By this is meant the use of censorship or other supervision to make objectionable utterances impossible. The second, is to provide for punishment for certain types of utterances. Congress has never attempted a censorship. Many constitutional lawyers believe that it would be a clear violation of the First Amendment.

As the matter stands it would seem as though Congress



may go a long ways in restricting freedom of speech in war time. Perhaps a censorship would not be permitted, but otherwise a war emergency seems to make the constitutional guaranty of freedom of expression largely meaningless.

MISCELLANEOUS GUARANTEES.—We have now discussed the more important of the constitutional safeguards against governmental interference with personal rights. At least we have discussed those concerning which constitutional questions have most frequently arisen. Four other guarantees are found in the early amendments. One prohibits the government from interfering with the right of assembly and petition. This, of course, still leaves with the government the authority to disperse disorderly assemblages whenever it has jurisdiction. The guarantee does not hold against the states, but when the petition is directed toward Congress such activity is one of the rights of United States citizenship with which the state may not interfere.

Another generally recognized right which is guaranteed by the Constitution—at least as against federal interference—is the right to bear arms. The states generally include a similar prohibition on the state government in the state constitution. Such guarantees do not prevent Congress or the legislature from regulating within its jurisdiction the sale of firearms and prohibiting the carrying of concealed weapons. The provisions against quartering of soldiers in times of peace has given rise to no constitutional problems whatever.

The Fifth Amendment states that no private property shall be taken for public use without just compensation. This overlaps with the due process clause. Clearly it would violate the due process clause to turn a man's private property over to the public and fail to make com-

pensation. This whole question will be discussed in the next chapter.

SLAVERY.—The Thirteenth Amendment prohibits slavery and involuntary servitude, except as a punishment for crime. It is directed at the states as well as at the federal government. Any federal or state law recognizing slavery would violate it. Before the passage of the amendment the power to regulate all relations between master and servant—including slavery—was in the hands of the several states. This power is still enjoyed by the states, but as far as slavery is concerned the federal government, too, may regulate. A federal law forbidding slave-holding would be valid. So it might be said that the Thirteenth Amendment delegated one more power to Congress—namely, to legislate against the particular personal relationship known as slavery. The amendment is also a limitation because Congress is thereby prohibited from legalizing slavery in any of the territories subject to its jurisdiction.

The slavery amendment, it should be noted, applies to individual action as well as governmental action. Not only is it unconstitutional for the government to permit slavery, but it is also unconstitutional for any individual to practice it. It is for this reason that Congress may regulate personal conduct when it comes under the head of slavery. This is one of the two places in the Constitution where personal conduct is directly regulated. The other is the prohibition of intoxicants in the Eighteenth Amendment.

A contract to serve as a laborer the breach of which is criminally punishable has been held to be a violation of the slavery amendment. Contracts of this sort can easily develop into peonage or other conditions closely akin to slavery. Suppose that Mr. A, a landowner, makes contracts for long terms of labor with a number of persons,

be they white or colored. Let us suppose, also, that the law makes the breach of such a contract a crime. Such a situation is in effect a form of involuntary servitude and is forbidden by the Thirteenth Amendment. No contract for personal services, with the exception noted in the next paragraph, may be enforced by making its breach a criminal offense. Of course, there is nothing in the Thirteenth Amendment or anywhere else in the Constitution to prevent a person from suing for damages for breach of contract.

There are just two cases in which the breach of a contract for personal services may be punishable as a crime. One is where public welfare rather than the interests of the employer demands it. For instance, it may be made a criminal offense for members of a train crew to abandon a train until a new crew appears or until a certain point is reached. The purpose of such a rule is not so much to protect the employer as to safeguard the general public. The second kind of personal service contract which may be enforced by criminal punishment is that of a seaman. The reason for this exception is largely historical. The modern trend is toward greater freedom in seaman's contracts, but a stringent agreement between a shipowner and his seamen is constitutional even though its breach subjects the seamen to fine or imprisonment.

The draft law of 1917 was attacked as violating the slavery amendment, but the Supreme Court said it did not. It is also constitutional for a state to compel all able-bodied men between the ages of twenty-one and forty-five to work several days each year in road building or repairing unless a cash tax is paid.

The Thirteenth Amendment does not guarantee the negro or any other person protection against discrimination which does not constitute slavery. If an innkeeper,

for example, refuses to admit negroes there is no violation of the anti-slavery provision. Therefore, the federal government has no authority to pass laws regulating such conduct. Such regulation is entirely a state matter. But a state law which denies any person the equal protection of the law is invalid—not as violating the Thirteenth Amendment, but because of conflict with the Fourteenth. The problems arising under denial of equal protection will be discussed in Chapter XII.

HOW PERSONAL RIGHTS ARE SAFEGUARDED AGAINST STATE INTERFERENCE.—There are five provisions in the Constitution which act as checks upon the several states in case any of them should try to infringe upon the rights of the individual: First, Prohibition of bills of attainder and, second, of *ex post facto* laws; third, the slavery amendment; fourth, the due process clause of the Fourteenth Amendment; and, fifth, the clause in the same amendment providing that no state shall “deny any person within its jurisdiction the equal protection of the laws.”

Bills of attainder and *ex post facto* laws have been discussed in connection with prohibitions against the federal government. The same is true of the anti-slavery provision. The due process clause has also been discussed to some extent. This clause is so important, however, that the next three chapters will be devoted largely to the relation between this clause and three great powers of government—eminent domain, taxation, and the police power. The equal protection clause is also important enough to receive detailed discussion and an entire chapter will be devoted to this topic.

## CHAPTER IX

### EMINENT DOMAIN AND DUE PROCESS

**M**EANING OF EMINENT DOMAIN.—As previously pointed out, eminent domain is the right of a government to compel the owners of any property within its jurisdiction to turn over such property to the government whenever the latter may require it. This right is one of the attributes of sovereignty, and unless there are restrictions in the constitution no property owner has any legal right to such ownership except at the sufferance of the government. *Arbitrary* governmental interference with private property, however, has always been abhorrent to enlightened peoples, and modern governments are compelled by pressure of public opinion to abstain from arbitrarily taking private property under the right of eminent domain.

In America the sovereign powers of the federal and state governments are limited by constitutional provisions. The Fifth Amendment provides that private property shall not be taken for a public purpose unless just compensation is made to the owner. In the same amendment Congress is prohibited from taking property without due process. The Fifth Amendment, of course, restricts only the federal government. After the Fourteenth Amendment was adopted, the due process clause was interpreted to include limitations upon state action in eminent domain. Many of the states had already, through state constitutional provisions, prohibited the taking of private property for public use without compensation. With the Fourteenth Amendment, however,



federal limitations also were imposed upon this sphere of state sovereignty.

The relation between eminent domain and the due process clause may be stated briefly as follows: (1) Private property may be taken by the government only for a public use. No private property may be taken under eminent domain for a private purpose. (2) When private property is taken for a public purpose there must be just compensation. (3) There must be notice given to the person whose property is to be taken and he must be given an opportunity to be heard especially in the matter of fixing the compensation. If these rules are not followed the property is said to be taken without due process and the transaction is unconstitutional. Because the federal and the state governments are alike limited—the first by the Fifth, and the second by the Fourteenth Amendment—the relation between due process and eminent domain may be discussed without a careful distinction between federal and state spheres of activity.

It is worth while to note the distinction between the wording of the contract clause and the due process provision. In the *contract clause* it is any *law* impairing the obligation of contracts which is forbidden. In the *due process clause* the prohibition is broader. *Any governmental act* which deprives any person of life, liberty, or property without due process is prohibited. Thus not only laws, but court decisions, administrative actions, and all other governmental actions are included. Through none of these must there be a deprivation of life, liberty, or property without due process.

As eminent domain is a sovereign power, it cannot be given away. As we noted in Chapter VII, any contract by which the state bargains away the right of eminent domain may be revoked, and such revocation is not an unconstitutional impairment of the obligation of a con-



tract. Exercising the right of eminent domain is sometimes referred to by the term *condemning property*, and the steps in the process, especially the hearing, are usually called condemnation proceedings. We shall use these terms frequently in the course of the discussion in this chapter.

While the right of eminent domain may not be given away, there is no constitutional objection to delegating this power to local governmental agencies. The states regularly give cities, counties, and other local units the authority to take property through the exercise of this power. Hence, it is not uncommon for municipalities to compel private owners to sell properties which are needed for such public purposes as streets, parks, school-houses and other public buildings.

The state may also delegate the right to condemn property to a private corporation when such corporation is engaged in any business which is public in its nature. Railroad companies are regularly authorized to take property in the name of the state. The acquisition of a right of way would be very difficult unless compulsory sales were possible. One property-owner in the proposed path of a railroad might hold up the whole project in spite of the willingness of a hundred other owners to sell the right of way. The building of a railroad is so closely related to public welfare that the delegation of the right of eminent domain is not only constitutional, but highly desirable. Water companies, electric-light companies, and other public utilities are generally given the right to condemn property when the taking of the property is essential to carrying on the legitimate business of the concern.

It is also constitutional to delegate the right of eminent domain to private persons if the purpose of the condemnation is public. If a water works, for example,

were owned by one private person, there would be no objection to giving such a person the right to compel landowners to sell him the right to put water mains through their properties. It is very unusual, however, for private individuals to be given this right. Practically all enterprises devoted to a public business are owned by corporations rather than by individuals. No corporation or individual is allowed to use the right except where the taking is necessary for the public good. The taking is held to be for a public use, even though the actual ownership is in the hands of the corporation as long as the nature of the business is such as to give the public a special interest in it.

The discussion in the last three paragraphs has dealt particularly with the way in which the states may delegate the right of eminent domain. It should be remembered, of course, that the federal government also may delegate this right. It may delegate such right as is within the scope of its powers. The federal government has, as pointed out in Chapter IV, only delegated powers itself. As it has no authority over the lighting problems of a city, it would therefore lack the authority to delegate the right of eminent domain to a municipal lighting plant to be located within a state. On the other hand, the federal government may exercise the right directly or through proper delegation for purposes which are federal—such as sites for government buildings, highways for interstate commerce, and so forth.

WHAT IS PUBLIC USE?—What is a public purpose in eminent domain is a question upon which the courts and not the legislature have the final word. If the legislature, for example, should provide for the taking by eminent domain of land for a factory site by a private corporation manufacturing automobiles, it does not follow that such use is a public one merely because of the

legislative declaration. The owner of the land may object to the condemnation proceedings and bring the matter before the courts, and their decision is final. In other words, the question of what is a public use is a judicial, and not a legislative, one.

There are certain uses to which property may be put which are unquestionably public. If land is taken to be used as a site for a state university, or if a city acquires property to be used for a city hall, the purpose in each case is obviously a public one. The same is true of property taken for any governmental function. Condemning property for use as roads and streets is a good illustration of the exercise of the right of eminent domain for a public use. Anything which the government does in the interest of public health, morals, or safety is a public purpose, and the acquisition of property by the state or its local subdivisions for any of these purposes is constitutional as far as use is concerned. The federal government may, of course, do the same as far as it is within the scope of its enumerated powers.

But suppose that private property is condemned merely for the purpose of beautifying the community? Can we count æsthetics among the public purposes along with health, morals, and safety? The answer to these questions is not as clear cut as it might be. Perhaps this is due to the fact that as a rule both the states and the federal government have only occasionally condemned property in the interests of æsthetics. When property is condemned for a park the purpose is frequently educational or for the promotion of health as well as for mere beautification. At any rate, the question as to whether the right of eminent domain may be exercised for æsthetic purposes has not received very much attention from the federal courts. Some of the early decisions in the state courts indicate an unwillingness to classify æsthet-

ics as a public purpose. In later cases, however, laws authorizing condemnation for æsthetic purposes have been upheld in some states.

When we come to the discussion of the police power in Chapter XI we shall note that the use of property may not be regulated in the interest of æsthetics. This means that the height of buildings cannot be regulated under the police power if the purpose is merely to preserve the view of a beautiful public building or to maintain natural scenery unimpaired. But it is possible for the government to restrict the height of the surrounding buildings and compensate the owners for damages due to the restriction. In other words, under the right of eminent domain the state (or the federal government) may take the right of the property-owner to erect structures above a certain height upon the payment of just compensation.

As already pointed out in an earlier paragraph, the right of eminent domain may be delegated to private enterprises engaged in any business of special interest to the public. The use of property by railroads and other public utilities is clearly a public one. Land may be condemned for building a spur track, even though the spur is run to a private industry and is intended only to serve the one industry. The court properly held that the public was also served by the track extension, even though the private industry was directly benefited. In the matter of a grain elevator, it depends on whether it is a private or public enterprise. An elevator operated as a purely private enterprise may not be given the right to condemn property. Laws authorizing public elevators to take property under eminent domain have been upheld by state courts. Taking land for a public cemetery has been upheld as a public use.

A mill-owner may be given the right to build a dam

which causes the flooding of lands farther up a stream, upon the payment of a just compensation to those property-owners whose property is taken by such flooding. Such cases have always been recognized as involving a public use because of the general interest of the public in grinding grain. A private corporation may also condemn property for building a dam which is to furnish water power for generating electric current. In these cases it is to the interest of the public generally to have the dam constructed rather than to allow the flooded lands to be put to other uses, such as agriculture. If later, however, the situation should be reversed, so that it would be to the interest of the public to lower the dam so as to make the flooded lands available for agriculture or other uses, it would then be entirely constitutional to reverse the process and give the owners of the submerged land the right to compel the dam-owners to lower the dam upon the payment of just compensation. This reversal has actually happened in the case of some dams. This has been due to the advent of steam and electricity making water power less imperative locally, as well as to the increase in the value of land used for agricultural purposes. The question of what is a public use then depends very frequently on the peculiar circumstances in a given case.

Irrigation is a public purpose even though the benefit occurs primarily to a private party. A private land-owner may constitutionally be permitted to condemn a strip of his neighbor's land so that an irrigation ditch may be built across it. Very properly the court took the attitude that the irrigation of land is a matter where the public generally is benefited. A use may be a public one for purposes of condemnation proceedings as long as the public benefits thereby, even though great benefits may also accrue to private parties.



There is one type of use which so far has not been recognized as public, but, which, it would seem, might be counted as one in which the public has as clear an interest as in some types now classified as public. We refer to the use of property by private or sectarian educational institutions. Education is clearly a public function. Why should not the state delegate to private organizations engaged in it the right to condemn surrounding property where there is a legitimate need for additional building sites? Is not the public as directly interested in education as it is in building a dam for electrical power? Any objection that might be made to giving sectarian organizations the right of eminent domain would be met, if the state would insist on certain supervisory powers over the courses of study of church schools. As it now stands, the expansion of a non-state college depends upon the whims of those who happen to own the surrounding property. It is not unlikely that some time in the future the courts will be willing to recognize the public purpose of education in private or sectarian schools to the extent that such institutions may constitutionally be granted the right to condemn property for necessary expansion.

It is apparent from the preceding paragraph that the term public use is not as simple as it may seem. Just what the term means must be determined by a study of the various court decisions on that point. While we have not attempted to make a comprehensive statement, the above discussion embodies the most salient features of judicial utterances on the subject. We have already pointed out that it is the duty of the courts to decide when a use is or is not a public one. A mere declaration by the legislature will not decide the matter. But, if the use is public, it is the function of the legislature to decide as to when and where any necessity exists for



condemnation proceedings. If taking land for an experimental farm comes within public use it is entirely within the power of the legislature to decide as to when the necessity of taking land for this purpose exists.

“TAKING” PROPERTY.—Another term which seems very simple, but which has been discussed and interpreted in a great many cases, is the word “taking.” If property is *taken* there must be due compensation. How much interference with property is necessary in order to constitute a *taking*? When the title to property is actually transferred it is obviously *taken*. But property may be taken even though the title is not transferred. Thus, the restriction of buildings to a certain height constitutes “taking” a certain portion of the rights of the property-owner.

The right to use the property of another for a particular purpose is called an easement. A good illustration is the right to drive across another’s property. If I wish to procure the right to drive across my neighbor’s land in order to make a short cut or for any other purpose, I may buy a strip of land outright, or I may buy from him the right to cross the land in a particular place. In the latter case I have merely an easement and have no right to the land except for the particular use which is designated in the agreement. An easement is therefore a form of property right and may be taken under eminent domain the same as any other kind of property. Of course, the rules of due process must be followed here as elsewhere.

Flooding of land is considered taking of property, for obviously such a situation would take away certain rights of the owner.<sup>1</sup> Any intrusion of sand, gravel, or other similar material upon a man’s land also constitutes a taking of the property. In a certain famous case, a rail-

<sup>1</sup> *Pumpelly v. Green Bay*, 13 Wallace 166.

road company had built a cut through a ridge of land which had protected a private landowner from flooding by a near-by stream. The water came through the cut during a flood in such a way as to carry away portions of the soil and to deposit gravel and sediment on the land of the plaintiff. The court held that this constituted a taking of the property for which he was entitled to just compensation.<sup>1</sup>

The pollution of the atmosphere by smoke has been held not to be a taking of property. In severe cases it is conceivable that the pollution of atmosphere over a piece of land may interfere with its usefulness as much as flooding or deposits of sand and gravel. Nevertheless, the courts have, so far, refused to consider such intrusions a taking of property. Noise may also interfere with the use of property, but in a Massachusetts case the state courts held that the ringing of a bell is not a taking of adjoining property, even though the sound interferes with the full use of such property. It should be remembered, however, that laws may be passed under the police power prohibiting or regulating smoke and noises whenever public health or safety demand it. Hence, if a property-owner is disturbed by noises and pollution of the atmosphere, his hope for relief lies in regulatory or prohibitive laws rather than in asking for payment for damages done.

A man who owns land along a navigable stream enjoys such ownership subject to the right of the public to use the stream for purposes of navigation. If the federal government—which has control over navigable waters—builds wharves or any other structures so as to interfere with the full use of his land, he can claim no compensation.<sup>2</sup> No property right is taken in such a case, for the

<sup>1</sup> *Eaton v. Boston, Concord and Montreal R. R. Co.*, 51 N. H. 504.

<sup>2</sup> *Scranton v. Wheeler*, 179 U. S. 141

riparian owner has only those rights which are left after the public makes any legitimate use of the river for navigation.

**PUBLIC HIGHWAYS.**—When the word street is used in this discussion it includes any highway unless expressly stated otherwise. The word municipality is used to mean any local governmental unit which may engage in opening, constructing, building, or maintaining roads. For most purposes the fundamental principle regarding the taking of property is the same for rural roads as for city streets.

When land is taken for a street the city may buy it outright or it may buy only an easement to use the strip of land for highway purposes. If it is bought outright the title to the land passes to the city (or other governing unit) and the city is said to own the land in fee simple. If only an easement is taken by the city it means that the title remains with the owner as before, but that the public has a right to use the strip of land in any way which is necessary for a highway.

If the city owns the street in fee simple the abutting property-owners have certain easements in the street. These easements are the right to light, air, and access. The abutting property-owners also have a right to lateral support from the soil of the highway. By lateral support we mean the right to insist that enough of the soil immediately adjoining the line must be left so as to give support to buildings or other structures which may be erected right on the line. But all of these easements—light, air, access, and lateral support—are subservient to the right of the public to use the street for highway purposes. When anything is done to a street by grading, by the erection of poles, or in any other way, the question whether this constitutes a proper use of the street for highway purposes may be raised. If the change or the

added use is for proper highway purposes, the abutting property-owners have no legal or constitutional right to object. On the other hand, if a burden is placed on the highway which is not a legitimate one the abutting owners must be compensated because their rights under the easement are "taken."

The situation in the last analysis is not very different if the city owns only an easement in the street. In that case the abutting owners may object if any use except that use proper for a highway is made of the strip of land. The abutting owners own the street in fee simple and any improper burden upon it is a *taking* of their rights. Hence when the city owns only an easement, the same question comes up in case water mains are to be placed in the street as would come up in case the city owned the fee simple. Is the placing of water mains under the street surface a proper use for highways? If it is, then the city may grant water companies the right to lay such mains under its easement to use the land for a highway; if it is not, the abutting owners must be compensated for the taking of their fee simple rights. If the city owns the fee simple and water mains are laid, the question here, too, is whether the laying of the mains is a proper use of the street. If it is not, abutting owners can object to any interference with the easement of light, air, access, or lateral support. If the laying of water mains is an undue burden, then the abutting owners are entitled to just compensation if the presence of the mains interferes with their easement rights.

Thus we see, that the chief problem in determining whether property is taken when changes are made in streets or when added uses are made of them, is the question of what is a proper use for a highway. It really does not matter so much whether the city owns the fee simple in the street or has only an easement. If

the city owns the fee simple, the abutting owners have an easement. If, on the other hand, the abutting owner owns his fee simple in the street, the city has an easement. In either case the abutting owner suffers a *taking* of his property when an improper burden is placed on the highway adjoining his holdings.

Any change in the grading of a street which makes it better adapted for highway purposes may be made, and even though new grading deprives an abutting owner of light, air, access, lateral support, or all of these rights, his property is nevertheless *not taken*. This may work a hardship on a person whose abutting property is located in a deep valley where a fill may greatly interfere with his light, air, and access. An equally great hardship would be suffered by one whose property is located on a hill where a deep cut would deprive him of access and lateral support. In neither case is there a taking of property, as the change in grading is a proper use of the street. About twenty years ago the Supreme Court decided an interesting case involving the building of a viaduct on 155th Street in the city of New York. One end of this street was closed by a steep bluff, and in order to make it a through street a viaduct was built, gradually ascending from the level of the street to the top of the bluff. In this way 155th Street was connected with the streets on top of the elevation. The viaduct was devoted entirely to ordinary street traffic. The plaintiff owned land and buildings on 155th Street at a point where the viaduct was fifty feet high. The structure came within ten feet of his building and materially impaired his easement right to light, air, and access. He claimed that this impairment constituted a *taking* of his property. The court denied this claim, holding that the easements of light, air, and access were held subject to "any improvement of the street for purposes of adapting it to



public travel" and that the viaduct was an improvement of this sort.<sup>1</sup>

Water mains, gas pipes, lamp-posts, and street railways are not added burdens to the street, as they are reasonably considered a part of local traffic. Telegraph and telephone poles are usually considered an added burden for which compensation to abutting owners must be made. Street railways are looked upon as a proper use of the streets, as their operation carries local traffic which would otherwise be on the street in other forms. For this reason the decision of the New York courts holding elevated railroads to be an added burden seems out of line. It would seem that an elevated street railway is merely an added improvement in taking care of heavy travel. In some states the elevated railroads are considered a proper highway improvement and no compensation need be made to abutting owners. Steam railways are considered an added burden. Courts are divided as to subways. Electric-light poles are an added burden except when they are used for street lighting.

There is a great deal of conflict as to the exact line between reasonable and unreasonable burdens for a highway. This is partly because some of the cases have not been carried to the Supreme Court. Besides, it may logically happen that a certain type of improvement may be a burden in one section of the country and not in another. Even in the same city what may be a legitimate burden on one street may conceivably be an unfair load for another.

**COMPENSATION FOR PROPERTY TAKEN.**—When a piece of property is taken outright the owner receives the market value. In case there is no outright transfer of title, but merely an injury or partial taking of property, the owner must be fairly reimbursed. In none of these

<sup>1</sup> *Sauer v. City of New York*, 206 U. S. 536.



cases are there any complications. All that is necessary is to fix the amount due. This is usually done by a board of impartial appraisers. When a piece of property is taken outright and adjoining property is injured because of the taking, the owner must be compensated not only for the land actually taken, but for the injury to adjoining property as well. Here again there are no constitutional difficulties. A fair appraisal is all that is necessary.

Complications arise, however, when only a portion of a tract is taken and the remainder is benefited rather than injured by the taking. Shall the benefits be deducted from the amount of compensation? There is nothing in the Constitution of the United States to prevent the deduction of special benefits. By special benefits we mean those which accrue to the man whose property is taken and not to the community generally. Many states protect the property-owner still farther by providing that special benefits shall be set off only against injuries and not against property taken outright. This is going farther than is necessary, however, to meet the requirements of the federal Constitution. When it comes to general benefits it has been held in one case<sup>1</sup> that increases in market value may also be deducted in determining the amount of compensation. This hardly seems fair to the property-owner because the increase in market value is enjoyed by his neighbors as well. It would seem that general benefits should not be deducted from the amount of compensation for property taken. Some states provide that such benefits shall not be deducted. Due to the diversity of state laws in regard to special and general benefits, it is impossible to state any general rules which would apply. As far as the federal Constitution is concerned it is clear that special

<sup>1</sup> *McCoy v. Union Elevated R. R. Co.*, 247 U. S. 354.

benefits may be deducted in determining amount of compensation. Perhaps general benefits, too, are deductible. In the McCoy case mentioned above, only one kind of general benefit—increase in market values—was considered. No doubt other types of general benefit might be deducted without violating the due process clause. It may bear repetition, however, that the state may protect beyond the requirements of the federal Constitution those who may lose property under condemnation proceedings. In a sense the due process requirements are minimum requirements. If the state exercises the right of eminent domain—or delegates its exercise to other agencies—it may properly throw added safeguards about those *against* whom it may be used.

CONSTITUTIONAL PROCEDURE IN EMINENT DOMAIN.—In order to conform with due process there must be notice and hearing in condemnation proceedings. The notice must be given personally, if possible, but if it is impossible, after using due diligence, to find the owner or if the property to be taken is owned by a person who resides outside of the state, it is permissible to publish a notice by posting a statement on the premises involved or by insertion in a newspaper.

The hearing need not be before a court; neither need a jury be used. Any group of persons may constitutionally be authorized to hear the case as long as it is reasonably certain that a fair hearing before an honest tribunal is assured. There may or may not be an appeal to the courts from the decision of the tribunal in charge of the condemnation proceedings.

FURTHER SAFEGUARDS IN STATE CONSTITUTIONS AGAINST DAMAGING PROPERTY.—In many cases the state constitution requires compensation not only when property is taken, but when it is *damaged* as well. This means, for example, that when the state or any of its

agents permits a nuisance to exist on its property there must be compensation for the damage done by the existence of the nuisance. Such protection is simply carrying the federal constitutional guarantees a step farther. If the New York constitution had contained such a provision, the decision in *Sauer v. New York* would have been different. Obviously the plaintiff's property was damaged in that case, even though it was not *taken* in the constitutional sense. In the states where this additional safeguard is found, the state and its agents are held liable for damages to property in the same way that an individual would be held for such damages to property of another.

## CHAPTER X

### TAXATION AND DUE PROCESS

**T**AXATION DISTINGUISHED FROM EMINENT DOMAIN.  
—Taxation is another of the sovereign powers of government. Like the right of eminent domain, it inheres in every organized government. Without it no organized political institution would be possible. No government can exist which does not have the power to take certain portions of the property of the citizen. While taxation and eminent domain both have to do with the sovereign power of the state they are distinguishable on at least two grounds. Taxes take a portion of the property located within the jurisdiction of the taxing body. It may be only a small portion, but in theory at least all property is treated more or less alike. In eminent domain a large portion, or even all, of one man's property may be taken, while that of his fellow citizens is untouched. Another important difference is in regard to compensation. When a portion of a man's property is taken by taxation he is compensated by the general benefits accruing from the existence of an organized government. His property receives police protection; his children are educated by the public school system, and so forth. In the case of special assessments, too, such as for paving a street, the taxpayer receives special benefits in return for the taxes paid. But in the case of eminent domain the man whose property is taken is properly looked upon as being entitled to direct compensation. This is the natural consequence of taking the property of one particular citizen rather than that of another.

In spite of these important differences, the sovereign power of taxation is like that of eminent domain in being limited by the due process clause. As has already been pointed out in previous chapters, there are also a number of other limitations upon the taxing power both of the state and of the federal government. Some of these were discussed in connection with the powers of the federal government and others in the chapter on interstate commerce. The purpose of this chapter is to consider the limitations upon both the federal and state governments found in the Fifth and Fourteenth Amendments, respectively, in the form of the due process clause. As has been stated more than once in this volume, the Fifth Amendment limits the federal government, while the Fourteenth Amendment circumscribes the power of the several states. As the limitation imposed by the due process clause is virtually the same in the case of the central government as in the case of the states, the clause will be discussed in its effect upon both without any careful distinction between federal and state activities.

In order to comply with the due process clause in levying taxes the following principles must be recognized: first, the taxing body must have jurisdiction over the person or thing taxed; second, the money raised by taxation must be used for a public purpose; and third, the rights of the taxpayers must be safeguarded by giving notice and in the case of certain types of taxes by affording an opportunity for a hearing.

Closely related to, and almost overlapping the due process clause is the further provision in the Fourteenth Amendment to the effect that no state shall deny to any person the equal protection of the law. The equal protection clause together with the due process requirement have been held to prohibit all taxes which are arbitrarily discriminatory. So we have a fourth principle, namely:

In classifying the objects of taxation there must be no arbitrary classification; or, to put it in another way, there must be some reasonable distinction between persons or things which are placed in different classes for the purposes of taxation. No doubt this fourth principle is based as much on the due process as on equal protection, but we shall defer the discussion of classification for taxation until we come to Chapter XII. This arrangement will be followed because arbitrary and discriminatory taxing methods are obviously a denial of the equal protection of the law.

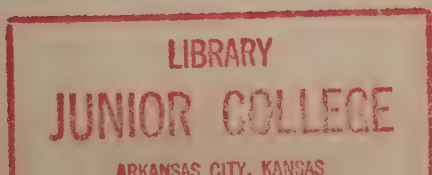
**JURISDICTION FOR PURPOSES OF TAXATION.**—If any government attempts to levy a tax where it has no jurisdiction it is no longer a tax but a confiscation of property. Hence it is necessary under due process for the taxing body to have jurisdiction. The question of jurisdiction is very simple in the matter of real estate. It is definitely located and there is no difficulty in determining the jurisdiction under which it is taxable. In the case of movable property, especially intangible property, the problem is not so easy; and when it comes to determining jurisdiction in the matter of inheritance and income taxes there are many complications. It is not within the scope of this work to go into details on this point. A whole volume might be written on the subject of jurisdiction for purposes of taxation. We must content ourselves with a few general statements which may, nevertheless, suffice to give the average American a better understanding of this phase of the subject. We shall divide the discussion of jurisdiction under three heads—(1) as to property taxes, (2) as to inheritance taxes, and (3) as to income taxes.

**JURISDICTION FOR TAXING PROPERTY.**—The location of property for purposes of taxation is called *situs*. Real estate is taxable only in the jurisdiction where it is



located. Obviously it would not be constitutional for Ohio to levy a tax on a farm in Indiana, or for the United States to tax buildings in Canada. The same rule holds also in case of easements in land. A right to use land for a particular purpose is property and as such is taxable, but only in the jurisdiction in which the land itself is taxable. A tax on real-estate mortgages may be levied in the jurisdiction where the mortgaged property lies.

Movable property is of two kinds—first, tangibles (often referred to as chattels), such as cattle, merchants' goods, the rolling stock of a railroad, and so forth; second, intangibles, such as stocks, bonds, credits, and so forth. In the case of tangibles, the rule is that they must be taxed where they are actually located and not at the residence of the owner. A man living in Ohio and owning live stock in Indiana need not pay any tax on such property in Ohio. But sometimes property moves back and forth between states so that it is difficult to determine just where its *situs* for taxation is located. This is especially true of the rolling stock of a railroad whose lines go into more than one state. In such a case each state may calculate by any reasonable method the approximate percentage of the total rolling stock which on the average is within the state and proceed to levy a property tax on that part. Suppose that a refrigerator company owning one hundred cars operating in several states does about one half of its business in Ohio. The amount of business done may be used as a basis of determining the number of cars to be taxed. Hence Ohio may levy a tax on fifty refrigerator cars. This does not mean that a particular group of fifty are taxed, for the cars in the state are made up of a constantly changing group. But it is constitutional to proceed as though one half the cars are actually located in Ohio.



**CORPORATE ASSETS LOCATED IN MORE THAN ONE STATE.**—The modern corporation is likely to own property in more than one state. This is particularly true of railways and express companies. How much property tax may a particular state constitutionally levy on an express company, for instance when the amount of tangible property located in the state is small compared to the value of the business done? About thirty years ago this question came up when the state of Ohio levied a property tax on the Adams Express Company out of all proportion to the amount of tangible property owned by the company in that state. The case came before the Supreme Court, where the Ohio tax levy was upheld as constitutional.<sup>1</sup> The state of Ohio had made use of the so-called “unit rule” in determining the amount of property with taxing *situs* in the state. In the case of the express company the aggregate of its tangibles in all states would represent only a small portion of the market value of the concern. Hence, if each state should have levied a tax on the tangible assets of the express company within the state, the sum total of the taxes collected in all the states would fall far short of what the total corporate assets ought to pay. For this reason Ohio proceeded to find what the total corporate assets were and then levied a tax on such a part of the entire assets as were apportionable to Ohio on the basis of mileage in the state and of business done. Investigation by the Ohio tax authorities showed that about one-thirtieth of the business and mileage of the express company was in Ohio. It was also discovered that the total corporate assets, tangible and intangible, of this concern was \$16,000,000. Ohio then maintained, and successfully, that one-thirtieth of \$16,000,000, or \$533,000, was taxable in Ohio. The amount of property owned by the express

<sup>1</sup> Adams Express Company *v.* Ohio, 166 U. S. 185.

company actually located in Ohio, including money and credits, was only \$67,000. The company fought this levy, contending that to assess property tangibly worth only \$67,000 as though it were worth \$533,000 was an invalid procedure. The court, however, as already indicated, accepted the unit of mileage and business as a proper one to apportion all corporate assets. Such a procedure is entirely fair. The value of the property of the express company actually in Ohio has added value because of its relation to the corporate whole and it is quite proper to count this added value in determining the amount to be assessed.

This "unit rule" for taxing concerns owning property in more than one state is applied very frequently, especially in the case of railroads, telegraphs, and sleeping-car companies. Track mileage has been used as a basis for apportioning the corporate assets of railroad and Pullman companies. For telegraph companies the ratio of the wire mileage in the state to the entire wire mileage is used in determining the portion of the entire assets of the telegraph company which are taxable in the state. If one state uses one basis, another a different one, a third, a still different, there is no constitutional objection as long as each basis is a reasonable one. Under such circumstances it may happen that the total of the percentages of all the states taken together may be more than 100. This does not invalidate any of the taxes, because each basis standing alone is reasonable. Besides, there is no constitutional objection to double taxation. This will be discussed more fully in a later paragraph.

The "unit rule" cannot be applied, of course, to those assets of the corporation which are not directly used as part of the regular business of the corporation. If a railroad company owns a number of coal mines in West Virginia, for example, it would not be valid for Ohio,

in apportioning the railroad property under the "unit rule," to include the coal mines in the corporate assets. Conversely, West Virginia may tax the mining property in addition to its proportion of the corporate assets.

In applying the "unit rule" any unreasonable basis must be avoided. Usually track mileage is a good basis in the case of railroads, but there may be situations when it is not. Suppose that a railroad company has a very valuable terminal in Chicago, but that 95 per cent of its mileage is located in Indiana. It would be unreasonable to allow Indiana to apportion 95 per cent of the entire assets for taxation purposes. Some other basis of allocation would have to be used.

**JURISDICTION IN CASE OF INTANGIBLE PROPERTY.**—The "unit rule" provides a feasible method for reaching intangibles held by corporations operating in more than one state. In the case of corporations located entirely within a state the intangible property is assessable in the same way as is the real estate and other tangible property.

In the case of intangible property individually owned the general rule is that it is taxable only in the state where the owner resides. This means that the *situs* of intangible property changes with the *situs* of the owner. There are some exceptions to this general rule, however. An important exception is in the case of corporation stock. A stockholder may be taxed on his stock not only in the state where he resides, but also in the state where the corporation is located. A mortgage on real estate, as already noted, is taxable where the land is located. It may also be taxed where the owner lives. This is another case of valid double taxation. Bonds held by a person living outside of the state may not be taxed in the state where the concern issuing the bonds is located. At the same time many evidences of indebtedness are taxable

at the residence of the debtor as well as at the residence of the creditor. When the Metropolitan Life Insurance Company loaned money to parties in Louisiana, that state levied a tax on the debts and the levy was upheld by the Supreme Court of the United States.<sup>1</sup>

Franchises are taxable as a part of the intangible value of a corporation. In determining the total corporate assets for taxation within one state or in using the "unit rule" for allocating property, it is constitutional to include whatever value accrues to the corporation from possessing a franchise. This, of course, is a property tax on the franchise and not a special franchise tax. A special tax may be levied only by the state which grants the franchise.

To summarize: Real estate and tangible property are taxable where they are actually located, regardless of the residence of owner. Intangible property is taxable at the residence of the owner and in some instances also, as in the case of debts, where the debtor resides. In the case of a corporation owning property in several states the total corporate assets may be apportioned to any state on any reasonable basis.

**JURISDICTION FOR LEVYING INHERITANCE TAXES.**—The inheritance tax is rapidly becoming a more important part of the budget of every government. The federal government levies a tax on inheritances, as do also many of the states. Such a tax is levied on the right to succeed to property on the death of the owner. Because it is a tax on the right of succession, the question of jurisdiction for taxing purposes becomes a question of what state has jurisdiction over the right of succession. The federal government under its taxing power collects the inheritance tax as an excise and it has jurisdiction in

<sup>1</sup> Metropolitan Life Insurance Company v. New Orleans, 205 U. S. 395.



this sense over all descent of property in the United States. It levies this tax not because it may control the succession, but merely as an excise tax.

In the case of state taxation, however, it is clearly outside of the jurisdiction of one state to levy a tax on the right of succession to property when the complete control of such succession is entirely in the hands of another state. It should be kept clearly in mind that this form of tax is levied *not upon property*, but upon *the right to take property through inheritance or by will*.

The succession in real estate is entirely in the hands of the state in which it is located. If Mr. A, whose residence is in the state of Ohio, dies leaving real estate in Ohio and in Indiana, Ohio may levy an inheritance tax only on that real property which is located in the state. Indiana may levy an inheritance on the realty within her borders, even though the deceased owner resided outside of the state.

Suppose that Mr. A also leaves a herd of cattle located in Ohio and a stock of merchandise in Indiana. Ohio has control over the succession of the chattels within her borders and hence may levy an inheritance tax on the herd of cattle. May Ohio also tax the right of the heirs to take the merchandise in Indiana? The common law rule is that chattels descend to heirs according to the laws of the domicile, or residence, of the owner at the time of his death. (This does not refer to the actual place where death occurs, but to the place where the deceased had his legal residence.) The common-law need not be followed by any state, but if Indiana recognizes it she may keep her hand off the merchandise and say in effect to Ohio, "You may decide how this is to descend because the deceased owner is a resident of your state." In that case Ohio may constitutionally levy an inheritance tax. Indiana may at the same time levy a tax for allowing



the property in her control to be governed by the state where the deceased resided. If Indiana, however, should abrogate the common law rule and provide how chattels owned by deceased nonresidents should pass on to heirs, Ohio would have no right to tax. Indiana, of course, may levy a tax because she has control over the succession of the merchandise. To repeat, inheritance taxes on chattels then may be levied in the state where such chattels are located. In case the deceased owner is a non-resident, the state in which the chattels are located may recognize the common law rule and allow them to descend with or without a tax according to the laws of the owner's domicile, in which case the state in which deceased resided may levy a tax. If, however, the state in which chattels are located refuses to recognize the common law rule, the other state has no basis for taxing the succession to them.

When it comes to inheritance taxes on intangible property the situation is still more complicated. One thing is clear, however—the state where the deceased resided at the time of his death may levy a tax. This is because of the rule that intangibles have their *situs* for purposes of direct property taxes at the residence of the owner. Complications arise, however, when we attempt to determine the conditions under which other states also may levy inheritance taxes on intangibles. Let us suppose that Mr. A at the time of his death owns stock in an Indiana corporation and has a deposit in an Indianapolis bank. Suppose also that he holds a promissory note from a man living in Indiana. It would probably be constitutional for Indiana to levy an inheritance tax in each of these cases. This is not illogical, because in the case of the deposit and of the note the money can be collected only with the help of Indiana, and as the stock in the Indiana corporation may be taxed as property by Indiana

there is no reason why that state should not tax the succession to the stock. The decisions of the courts, however, are not entirely clear on the matter of jurisdiction for levying inheritance taxes on intangibles. In general, it can be said that such taxes may be levied by the state in which the deceased owner is domiciled, and that other states that have certain forms of direct control over the debtor may also levy inheritance taxes. It will help the student of constitutional law at this point to remember the fundamental proposition stated at the beginning of the discussion of inheritance taxes—namely, the jurisdiction for levying inheritance taxes depends on jurisdiction over the control of the right to succeed to the property involved, be it real or personal, tangible or intangible.

**JURISDICTION FOR LEVYING INCOME TAXES.**—There are two ways in which a state may take jurisdiction for purposes of levying an income tax. One way is by jurisdiction over the person who receives the income. A state may levy a tax on the income of all residents of the state. It makes no difference where the source of the income may be. It may be outside the state or in a foreign country as long as the recipient is a resident of the state.

A second basis for jurisdiction exists in relation to incomes derived from business, profession, or occupation within the state, even though the recipient is a non-resident. In other words, the state of Ohio, for example, may, as far as the federal Constitution is concerned, levy an income tax, first, on the incomes of all persons residing in Ohio regardless of whether the sources of income are within the state and, second, on all incomes derived from Ohio enterprises regardless of where the recipient lives. The same general principles hold in determining federal jurisdiction for levying income taxes. It should be remembered, of course, that no state may

levy a tax on the income, in the form of salaries, of federal officials or interest on federal bonds. Conversely, the federal government cannot tax the incomes of state officials nor incomes derived from investments in state and municipal bonds.

**DOUBLE TAXATION.**—There is nothing in the constitution to prevent the state and federal government, respectively, from levying a tax on the same object. There may be both a federal and a state tax on the same incomes, or on the same property. Sometimes there may be double taxation in the sense that two different states may levy a tax on the same thing. There is no violation of due process when this occurs, assuming, of course, that each state has jurisdiction. As we have seen from the preceding discussion, there are many instances when the tax burden may fall twice upon the same piece of property—or the same right—due to the overlapping of jurisdictions. The taxing of mortgages in the state where mortgaged property is located, as well as at the residence of the debtor, is a good illustration of double taxation which does not violate due process. Within the same state double taxation may be unfair, but unless it is so arbitrary and discriminatory as to violate the equal protection clause there is no violation of the federal Constitution. Paying taxes on the same object in more than one state may possibly involve some hardship, but there is not necessarily any infringement of the due process clause.

**WHAT IS A PUBLIC PURPOSE?**—Whenever money raised by taxation is used for anything but a public purpose the due purpose clause is violated. Any law or ordinance raising revenue or appropriating funds for any other than a public purpose is unconstitutional. Hence, the question of what purposes are public is a pertinent one in discussing the constitutional problems of taxation.

There are certain functions which are always recognized as properly governmental. All the activities connected with making and enforcing laws, and all agencies necessary for administering justice and for protecting the public from domestic and foreign enemies, are public, and money expended in support of them is obviously devoted to a public purpose.

There are many other activities which, while not absolutely necessary for the maintenance of law and order, are, nevertheless, so closely related to the public welfare that they may be supported by public funds. Education is one of these, as are also charitable institutions. Education may include not only schoolhouses, but libraries, museums, playgrounds, and parks. Any activity the chief aim of which is the preservation of public health, morals, safety, or general welfare, may receive public funds. Money raised by taxation may be expended for the operation of publicly owned railroads, street railways, water works, and so forth. On the other hand, the appropriation of money to privately owned public utilities except for services, or other value received, would not be for a public purpose unless special public aid would be necessary in order to encourage such enterprises. Thus, a city may, for example, operate an electric-light plant and use public funds for defraying expenses. It may, on the other hand, consider it wise to allow a private concern to furnish the electric current for the community. If, in order to enlist private capital in the enterprise, it is necessary to give aid from the public treasury for a period of years until the project becomes a going concern, such aid is for a public purpose even though the money is turned over to private persons.

If private capital were available for building and operating electric light plants without any guarantee of aid from the government, such aids would not be for a public

purpose. Neither would such aid be constitutional if it were not for the fact that the enterprise is one in which the general public has a vital interest. Public aid given to an automobile factory would be held invalid unless, of course, we can imagine a situation where the manufacture of automobiles is vitally connected with the general welfare of the public. The manufacture of military trucks in time of war might come possibly in this category.

In the case of *Loan Association v. Topeka*<sup>1</sup> the Supreme Court was called upon to decide the question of whether public funds might be used to aid in the establishment of a private iron works. The city of Topeka, in order to encourage such an enterprise, had agreed to pay certain amounts toward it. This action was attacked on the grounds that the expenditure was not for a public purpose. The court held that, in view of the fact that private capital was readily available for building the iron works, there was no public need and it was declared unconstitutional to use public funds for this purpose. The situation was not altered by the fact that the general public would incidentally profit by the establishment of new industries. One can conceive of a situation, however, where it would be valid to give public aid to a private iron works. Suppose that the building of bridges or other public structures is vital to the public interest of a community and that iron parts necessary for these structures are not available. Let us suppose further that private capital is not willing to assume the risk involved in the new enterprise. Under such circumstances it is not unlikely that the court would uphold giving aid to the iron works as a public purpose. This would not necessarily mean a reversal of the Topeka case, but would rather be a recognition of the fact that the defini-

<sup>1</sup> 20 Wallace 655.



tion of public purpose depends on social and economic conditions.

In recent years there has been a marked increase in the number of governmental activities. This has been due in part to the growth of the belief that certain types of business may be handled better by the government than by private enterprise. It has also come from the realization that many private activities need governmental regulation and inspection. It is constitutional to spend public money to pay the expenses of regulatory boards and commissions, even though these agencies devote their entire time to regulating and supervising private enterprises. Such regulation, being in the interest of general welfare, is properly classed as having a public purpose.

Some of the recent decisions of the Supreme Court have upheld expenditures for purposes which a century ago would have been looked upon as a clear invasion of the freedom of private business. A few years ago the city of Portland, Maine, established a public fuel yard and appropriated money for its maintenance. This action was recognized by the Supreme Court as having a public purpose.<sup>1</sup> Perhaps no state has gone farther into the field of what has historically been looked upon as the domain of private enterprise than has North Dakota. Among the activities for which public funds have been appropriated in that state are a mill and elevator association; a project for manufacturing and marketing farm implements and farm products; a home-building association, the purpose of which is to make it easier for the residents of the state to secure proper housing; and a state bank—not in the sense of a bank regulated by state laws as opposed to federal regulation but a bank owned and operated by the state as a part of its governmental functions. These expenditures were vigorously

<sup>1</sup> Jones v. City of Portland, 245 U. S. 217.



attacked as failing to serve a public purpose. The whole question reached the United States Supreme Court in 1920 in the famous case of *Green v. Frazier*.<sup>1</sup> Without a dissenting vote the court declared that these purposes were public. This view is no doubt partly due to the fact that North Dakota is so largely an agricultural state. The same line of reasoning, however, would lead the court to accept any invasion of private enterprises by state agencies when such invasion has a reasonable relation to public welfare. Does this mean that socialistic projects will be upheld as public purposes? As the matter now stands there seems to be nothing under the due process clause to prevent the expenditure of money raised by taxation for enterprises which represent a marked movement toward the socialistic state. This, of course, does not necessarily mean that socialism is a desirable form of state activity. It means simply that the definition of public purpose is broad enough to include any activity in which social and economic conditions make it desirable for the state to engage.

**CHARITY AS A PUBLIC PURPOSE.**—Money raised by taxation cannot be turned over to private individuals. A law or an ordinance which, for example, appropriates ten dollars apiece to every person in a certain community is invalid. But if every person in the community is in dire need it is constitutional to appropriate money to relieve distress. Charity has always been considered a public purpose. To draw the line between what is usually recognized as charity and other forms of public aid to individuals is not always an easy matter.

After the Boston fire of 1871 the state of Massachusetts authorized the city to issue bonds so that a fund might be established from which persons whose buildings had been burned might borrow money for rebuilding.

<sup>1</sup> 253 U. S. 233.

The supreme court of Massachusetts held this procedure to be invalid on the grounds that such expenditure was not for a public purpose.<sup>1</sup> The matter was not carried to the United States Supreme Court. Perhaps fifty years ago that court would have affirmed the Massachusetts holding, but judging by the decision in the North Dakota case (*Green v. Frazier*), it is likely that such an expenditure would now be upheld as having a public purpose. It would seem that the state might go a long ways in aiding persons who are sufferers in such an unusual calamity as the Boston fire without exposing the public treasury to any danger from continuous raids by those who may feel the need of public aid.

The Wisconsin courts upheld a law which appropriated public funds to pay relief for tornado victims, such relief including aid to the injured, burial of the dead victims, and assistance in clearing away the wreckage of the storm. In at least two states the question as to whether public money might constitutionally be spent in buying seed grain for farmers where a series of bad years had made them destitute has been raised. This question did not reach the federal courts, but the supreme court of North Dakota over thirty years ago upheld such an expenditure as being for a public purpose. A law of much the same tenor was declared invalid in Kansas as being a payment of public funds to private persons. It would seem that the North Dakota viewpoint is the better one. In an agricultural state it can hardly be denied that the encouragement of the fundamental industry, by helping those who have suffered by adverse climatic conditions, is a public purpose.

A law appropriating ten thousand dollars from the state treasury to be turned over as a gift to John Smith would be invalid. If John Smith has enough political

<sup>1</sup> *Lowell v. City of Boston*, 161 Mass. 454.

friends there are, of course, others ways in which he may legally secure the money. The legislature may, for example establish a new office of assistant inspector of highways with no duties to speak of and a salary of ten thousand a year, and John Smith may be appointed to office and receive the amount, with no more return to the state than if it had been given outright. Of course, it is not likely that anything so obvious as this will happen, but public money is frequently used to pay public officials who do not give value received in the form of service. It is also often used to pay for goods and materials that are priced too high to pay for contracts that may have been granted as political patronage. In all of these cases public money is in reality paid out to private persons. All such payments, however, are valid. No court will go into the wisdom of public expenditures, and if the legislature spends more money than a good administrator would deem necessary for a given purpose, which on the surface at least is public, but which, due to corruption in the governmental machine, is in reality a gift to private persons, the courts have no right to object on the ground that public purpose is lacking.

A highly proper form of the payment of public moneys to private individuals and one which has been upheld by the courts is the pension. The pension, be it to old employees, firemen, policemen, or soldiers, or to the families of any of these, is not a gift, but a payment for services rendered.

Some interesting questions have arisen as to how far a government may go in offering amusements to the public. Parks are recognized as having a public purpose, as are playgrounds for children, but these are so recognized because of their relation to health and education. The expenditure of public money for fireworks as a part of a Fourth of July celebration has been held unconsti-

tutional as lacking a public purpose. At present the courts would probably frown on public expenditures for public amusement enterprises, but if it can be scientifically shown that recreation and amusement of the right type are conducive to the general welfare it is not inconceivable that appropriations for that sort of thing may be held valid. It would not be surprising if the time would come when it will be considered not only constitutional but desirable for the state to furnish certain types of recreation and amusement—not necessarily without charge—to the general public.

IS THE DISCHARGE OF A MORAL OBLIGATION A PUBLIC PURPOSE?—Suppose that the bonds of a city through some formal oversight are found not to be binding—perhaps the details as to a referendum were not properly carried out or perhaps the proper officials have failed to sign them properly. The bonds were issued in good faith, but now the city finds that it is under no legal obligation to pay them. The private bondholders have nothing coming from the city legally. Let us suppose that the city council nevertheless recognizes a moral obligation and appropriates money to pay the interest and the principal of the bonds. Here we have money taken out of the public treasury and turned over to private persons who have no legal claim upon it. Such an expenditure is valid and is held to be for a public purpose. This is the proper viewpoint. Modern political thought recognizes more and more the moral as well as the legal duties of the state, and to designate the payment of obligations which are merely moral as public is a sign that we are moving away from the notion that the state can do no wrong.

TAX EXEMPTIONS AND PUBLIC PURPOSE.—The payment of public money to a church would be invalid. The state, however, may, and frequently does, exempt church prop-

erty from taxation. In effect, this is the same as though public aid is given. The exemption of church property from taxation is nevertheless valid. This view is probably due to the historical background of the relationship between church and state. For centuries it has been the custom to exempt church property from taxation and such a practice has been followed even where there is complete separation of the church and state.

Tax exemption of a private individual or corporation is virtually a payment to such parties of public funds, and yet such exemptions have never been invalidated as lacking a public purpose. Tax exemption granted to private persons as an encouragement of businesses in which the public has a vital interest would of course be valid just as an outright grant in such a case would also be upheld.

NOTICE AND HEARING IN TAXATION.—Taxes may be classified under two heads—first, *ad valorem* and, second, specific. *Ad valorem* taxes are those which are levied according to the value of the thing taxed. Specific taxes are those which are levied per object, or per unit, without regard to an assessed valuation. Thus, a tax of five dollars per car on all automobiles is a specific tax, while a one-mill tax on all automobiles based on their value is an *ad valorem* tax.

In the case of an *ad valorem* tax due process demands that certain forms of notice and hearing be available. The notice is usually considered sufficient when the law fixes a time when a hearing on the valuation of property shall be held. A posted notice of the time of meeting of the board of tax review is also sufficient. A hearing before a board of review is sufficient to meet the constitutional requirements. Such opportunity need not be offered before the property is assessed, but it must be



afforded before the tax can be considered finally and definitely fixed.

When special assessments are made—such as for the paving of a street—questions arise not only as to the value of the property, but also as to the amount of property and as to the amount of benefit received from the improvement. All of these questions must be heard before the tax can legally be collected. All of them are really a part of the process of evaluating the benefit for which the individual property-owner must pay. The whole matter of special assessments and proper classification is discussed in the chapter on equal protection of the law.

When the tax is not based on valuation there is no requirement under due process that notice and hearing be given. If the law provides for a tax of five dollars on each automobile in the state, no automobile-owner can object to paying this amount on the ground that he has not been notified or was not given an opportunity to be heard. He may refuse to pay on the ground that the object taxed as a car is not in reality an automobile, or he may refuse point blank to pay the tax. In that case the question is brought into court and the matter disposed of. Perhaps it might properly be said that such an appearance before a court constitutes due notice and hearing.

Thus it will be seen that the due process requirements in taxation are not as exacting as in eminent domain, and in no measure comparable to the requirements in criminal procedure. In the overwhelming majority of cases there is no thought or no desire for a hearing on the part of the taxpayer. It is well, however, that any possible irregularity in property valuation is rendered less likely by the right of notice and hearing.



CLASSIFICATION OF OBJECTS FOR TAXATION.—No discussion of the constitutional law of taxation is complete without a consideration of the constitutional requirements which must be observed in classifying persons and property for purposes of taxation. Because a discriminatory classification involves the equal protection clause as much as, if not more than, it does the due process provision, the discussion of classification in taxation will be taken up under the head of equal protection, which is the topic of Chapter XII.

## CHAPTER XI

### POLICE POWER AND DUE PROCESS

**W**HAT IS MEANT BY POLICE POWER?—The powers of government are classified under various heads. We group those powers which are exercised in the interest of national defense or for aggressive attacks on other countries under the head of war powers. To those which are exercised for the purpose of raising revenue to support governmental functions we apply the term taxation. Under eminent domain we place the powers through the exercise of which, private property is taken over by the government. These three classes of powers have since time immemorial been exercised by the state. Absolute monarchies, limited monarchies, republics—all have exercised these powers. Along with these powers stands another group known as the police power. Like them, the police power has always been the attribute of governments. In modern times, however, the police power has become more and more comprehensive. *By police power we mean the regulation of conduct in the interest of public welfare.*

The federal government has no inherent right to exercise police power, but in connection with its many delegated powers it does enjoy considerable power to regulate conduct in the public interest. In connection with the war power and other powers relating to foreign affairs, in connection with interstate commerce and the operation of the mail system, in fact in connection with any and all of the delegated powers, the United States government may exercise police power. But no power

to regulate conduct may be exercised by the federal government except as it may be necessary to carry out the powers expressly given it. In other words, whatever police power the United States has is implied. On the other hand, the several states have the inherent right to regulate the conduct of individuals, and except for the grants of power to the federal government and the prohibitions upon the states, each state may do as it chooses in exercising the police power. Because most of the phases of individual activity are outside of federal control it is upon the several states that the duty of regulating conduct largely devolves. Questions involving the constitutionality of legislation under this power have arisen in connection with federal and with state regulation. Naturally, however, most of the cases of this nature have been raised regarding state legislation.

The exercise of a power as far-reaching as the regulation of conduct may at times interfere with life, liberty, and property. It frequently becomes necessary to deprive a person of one or more of these important rights in order that public welfare may be safeguarded. Hence, we have before us in this chapter the task of harmonizing these two propositions: first, one of the essential powers of every government is the regulation of conduct in the interest of the general welfare even though such regulation may deprive certain persons of life, liberty, or property; second, the constitutional provisions in the Fifth and Fourteenth Amendments which prohibit the federal and state governments, respectively, from depriving any person "of life, liberty or property without due process of law." The only hope of harmonizing these two propositions lies in so construing the due process clause as to allow a certain amount of interference when public welfare demands it. This is exactly what has happened. Stated briefly, the relation between the police

power and due process is this: Whenever, in connection with the regulation of conduct in the interest of the public welfare, it becomes necessary to regulate conduct in such a way as to deprive a person of life, liberty, or property, such deprivation is not a violation of due process if there is a reasonable relation between such regulation and public health, morals, safety, or general economic welfare. The problem, then, which faces us when we attempt to determine whether a given police regulation is a violation of the due process clause is the *reasonableness of the relation* between the public welfare and the deprivation which some one suffers because of the regulation. A severe deprivation which only to a slight degree promotes general welfare obviously involves a lack of relationship. If the deprivation is severe, the need of the regulation must be greater than if the deprivation is more moderate and no deprivation of life, liberty, or property is considered due process unless the public welfare demands it.

Thus, the police power and the due process clause are in a sense opposing forces. Through the first the state reaches out, and, whenever necessary, interferes with the complete enjoyment of life, liberty, or property. The second is a warning to the government that it must not go too far in this interference—a warning which frequently amounts to a prohibition and one which must be heeded. Superficial students of the Constitution sometimes get the mistaken notion that the due process clause has so circumscribed and vitiated the police power that the state in effect has been deprived of some of its sovereignty. Others have made an equally great mistake in going to the opposite extreme and have gotten the idea that, while the due process clause limits the other powers of government, the police power remains uncircumscribed, and that when it comes to regulate human conduct in the

interest of public welfare the government may do exactly as it pleases without fear of violating due process. If the first concept were correct, the state would indeed be in a sorry state, for it is almost impossible to regulate conduct without at times depriving individuals of life, liberty, or property. On the other hand, an acceptance of the second concept would practically wipe away the most sweeping of the constitutional guarantees against arbitrary regulation of conduct. The second situation would not be so serious as would the first, because it is not unlikely that our legislatures and administrative officers, especially the former, would respect our rights even though no binding constitutional guarantees existed. This is the case in England, where the Parliament may, if it chooses, deprive any person, or persons, of life, liberty, or property in the most arbitrary fashion. Furthermore, the English courts would refuse to nullify such a law. What we are trying to point out is that of the two extremes it would no doubt be less dangerous to public welfare to remove constitutional guarantees entirely than to impair materially the police power of the state. Under our constitutional system we do not follow either of these two courses. The government has vast power over the conduct of individuals. At the same time we make it impossible for a legislature or an administrative officer to impose regulations of conduct which are out of line with what a reasonable man would consider necessary for public welfare—that is, to repeat a statement made in an earlier paragraph, no regulation of conduct is considered due process unless there is a reasonable relation between the regulation and public welfare.

**OTHER CONSTITUTIONAL LIMITATIONS AND THE POLICE POWER.**—While the due process clause is the most sweeping of the limitations upon the police power, there are

also other constitutional provisions which limit its exercise. No state law passed under the police power may impair the obligation of a contract. No exercise of the police power by any state may place an undue burden on interstate commerce. No *ex post facto* law or bill of attainder must be passed, and no state may under the pretext of regulating conduct interfere with the workings of the federal governmental machine. In general, any limitation upon the power of the states or the federal government amounts more or less directly to a limitation of the police power of the respective governments. This is true because the police power is such an all-pervading function of the state that any general limitation almost inevitably affects it.

WHAT IS MEANT BY PUBLIC WELFARE?—The health, morals, and safety of the public have always been recognized as being a part of the public welfare. The health, morals, and safety of the public depend on the health, morals, and safety of individuals. Any conduct, or any use of property, which endangers the individual in any of these fields may be forbidden as long as the prohibition is a reasonable one without violating the due process clause. Quarantine in case of contagious disease, laws against indecent posters, or legislation compelling owners of buildings, using elevators, to submit to an inspection—each of these interferes with liberty and with the use of property. In each case the purpose is to safeguard public health, morals, or safety. By safety is meant not only freedom from danger from careless operation of machines, from falling buildings, or any form of injury to life or limb resulting from contact with inanimate things. Safety includes also freedom from disorder. Laws compelling whites and blacks to use different railway carriages, for example, are upheld as such a regulation.



Protection against fraud and deceit is in a sense, a part of safety regulations.

Protection against fraud might also be upheld on the grounds that economic interests must be protected. The regulation of conduct in order to protect the economic welfare of the public is a comparatively recent development. There was a time when economic interests were left to themselves, and as long as public health, morals, or safety were not endangered they were left unregulated. This was a part of the *laissez-faire*, or hands off policy. With the growth of big business, however, it soon became evident that the policy of hands off toward economic interests was not always conducive to public welfare. This was especially true in those businesses that furnished public service such as light, water, or transportation. Now, the courts regularly uphold any regulation of business which is vital to the economic welfare of the public. In the regulation of rates and of services of public utilities we have a comparatively new field for the exercise of the police power. The relation of this type of regulation to due process will be discussed in a later paragraph.

**POLICE POWER AND ÆSTHETICS.**—If the purpose of a police regulation is merely æsthetic it will not be upheld as due process. As the matter now stands, it is unconstitutional to deprive any person of life, liberty, or property in the interests of beauty. A law prohibiting the use of billboards on the ground of ugliness would be invalid. Billboards may be regulated, but it must be on other than æsthetic grounds. The owners of billboards may be compelled to build them so as to be absolutely safe against collapsing and injuring passers-by. If a billboard is so located as to provide a hiding-place for criminals, or be subject to use in such way that the health, safety, morals, and economic welfare are menaced, it may be prohibited. If the height of buildings

is regulated it must be on other grounds than that of æsthetics.

Because of the refusal to accept æsthetics as a public purpose under police power it is outside the power of the government to compel property-owners to beautify their respective premises. Rubbish that is a menace to health may be prohibited, but no clean-up campaign in the interest of civic beauty can be backed up by compulsion by the government. Building lines and other restrictions, if they are to be valid, must be based on other than æsthetic grounds. Frequently building lines are established by agreement between property-owners or by provisions in deeds transferring title to lots on certain blocks. Such restrictions, of course, are private matters and do not involve the police power.

The philosophy back of the refusal to recognize æsthetics as a valid basis for exercising the police power is perhaps due to a notion that beauty is not as essential to public welfare as are health, morals, or safety. No doubt this notion is in most cases a correct one. And yet with the advance of civilization and the accompanying increase of culture and refinement it is not unlikely that the time may come when æsthetics will hold a bigger place in the consciousness of the average man than it now does, and when the courts will say that æsthetics, while perhaps not as fundamental to welfare as health, morals, and safety, are nevertheless, of enough value to make regulation of conduct in its behalf valid. The courts have already shown a willingness to uphold regulations which seem to be motivated largely by æsthetic considerations as long as there are also some signs of other grounds for the regulation. It often happens that a law prompted primarily by a desire for civic beauty may be upheld on one or the other of the recognized bases for regulation.

While the police power may not be exercised merely for æsthetic purposes it is well to recall the point made in Chapter IX to the effect that the right of eminent domain may be exercised for such purposes. Thus, an ordinance prohibiting buildings over a certain height because of obstruction of a beautiful view would be invalid, but it would be constitutional to compel the owner of the site to sell for just compensation his right to erect buildings higher than the designated height limit.

REGULATIONS IN THE INTEREST OF PUBLIC HEALTH.—The various branches of the medical profession are properly subject to detailed regulation. There is a very close relation between the licensing of physicians and public health. It is constitutional to prohibit all persons from practicing any form of healing unless they are reasonably well trained. A refusal to license chiropractors is valid. The practice of dentistry is subject to detailed control.

Not only does the police power extend to those engaged in healing diseases, but it covers also any regulations intended to prevent disease. Indeed, it is in the field of prevention rather than cure that governmental action may be particularly valuable. A common form of interference with liberty is the quarantine. The deprivation of liberty and of the use of property during the quarantine period may be serious, but the courts properly recognize the necessity of such a hardship. The laws of quarantine, like all police regulations, must be reasonable. To require the complete isolation of all persons suffering from minor ailments would be a deprivation out of all proportion to the public necessity for such quarantine. The proper disposal of sewage and garbage is subject to strict supervision because of its obvious relation to public health.

The state may even invade the sanctity of the person

to the extent that the individual may be compelled to submit to vaccination. Such regulations have been vigorously opposed in some quarters, especially by those who do not believe that this is a proper method of prevention. The question of the validity of compulsory vaccination came squarely before the Supreme Court over twenty years ago in the case of *Jacobson v. Massachusetts*.<sup>1</sup> Under authority of a state law the board of health of Cambridge ordered all persons who had not been successfully vaccinated within five years to submit to that form of prevention. Jacobson was tried for refusing to comply with the order. After he was convicted by the state courts he appealed to the Supreme Court of the United States. He insisted that such a regulation was an unconstitutional deprivation of his rights under the Fourteenth Amendment and offered to show that in certain cases persons had been injured by vaccination. The court, however, would not recognize his contention. The dangers of vaccination were small compared with the public benefits derived from its general use. The prevailing opinion among medical men is that vaccination is a proper method and the minority who disagree may be compelled to obey the law. Membership in a religious body whose teachings oppose vaccination would not excuse one from the operation of the regulation compelling it. A health regulation is valid even though in a few exceptional cases it may involve hardship and even though a minority look upon it as unwise or even highly objectionable.

The regulation of the food supply has a close relation to public health. It is only comparatively recently that governments have interfered with those who are engaged in producing or selling food materials. Strict supervision of the milk supply is constitutional not only as a

<sup>1</sup>197 U. S. 11.

health measure, but also as a protection against fraud. The same is true of the laws which regulate or prohibit the manufacture and sale of adulterated or misbranded foods and drugs. Legislation against smoke nuisance is, as a health measure, a legitimate restraint upon liberty and the use of property. Burial of the dead may also be regulated in the interests of public health. In the field of health regulation and especially in matters of prevention the possibilities of wise governmental interference is very great. By compelling school children to submit to tests showing susceptibility to certain diseases and to take the proper preventive steps in case of susceptibility, by a rigid enforcement of sanitary laws, and by many other means the state may wisely as well as constitutionally go even farther than it has in promoting and protecting public health.

REGULATION OF LABOR IN THE INTEREST OF PUBLIC HEALTH AND GENERAL WELFARE.—The liberty of a laborer includes the right to work for whom he pleases, at whatever occupation he cares to engage in, at whatever wages he is willing to accept, and to put in as many hours a day as he prefers. The liberty of the employer includes the right to engage workers to do any kind of work at whatever rate of pay and under whatever arrangement as to length of working day upon which the employer and employee may agree. No legislation must deprive the worker or the employer of these liberties unless public welfare makes it necessary. A few decades ago the average person would very likely have been of the opinion that the general public was not concerned with hours of labor. Any working conditions which were obviously unhealthful might have been considered as proper subjects for regulation, but the number of hours per day would have been looked upon as a matter



which the individual employer and employee might decide for themselves.

With the added complexity of modern working conditions, however, it is plain that the welfare of the general public may be affected by the length of the working day. It is now generally recognized that public health may be adversely affected by too long a working day, or by too many hours of work per week. To ask a workman to put in excessively long hours is bad for his own health, and when an industry employs a large number of men the aggregate of danger to the well-being of all the employees from long hours makes the matter one of close relation to public health. Besides, the welfare of the public outside the industry is menaced by long working hours. If long hours imperil the health of bakers, the consumers of the bread are also imperilled. Long hours may also threaten the safety of the general public. An overworked elevator boy may place the users of the elevator in danger. Fatigued members of a train crew are not as alert in averting accidents as those who are not overworked.

Hence, there is ample reason for saying that there is a reasonable relation between regulating the hours of labor and public welfare. This does not mean, of course, that the legislature may regulate hours of labor as it sees fit. Only such regulation as is necessary to protect the public welfare is valid. Any other interference is a violation of the due process clause. The fundamental question, then, in connection with legislation restricting the hours of labor is whether there is a reasonable relation between the particular restriction and public welfare. Restricting hours of labor on a farm might be unconstitutional, while a similar restriction in mining might be upheld. If long hours for women are especially dangerous to the health of such workers, as well as to



the health of the race, it is constitutional to place more severe restrictions on female workers than on male. Hours of labor for children may be more closely regulated than for adults.

When a court is called upon to decide whether a particular piece of labor legislation is constitutional it frequently happens that a knowledge of sociology, psychology, and physiology is fully as important as a knowledge of law. The law regarding the matter is comparatively simple. Any regulation which bears a reasonable relation to public welfare is valid. But what constitutes a reasonable relation? Why should a ten-hour day in a certain industry be upheld while an eight-hour day in the same industry may be counted as taking liberty without due process? This all depends upon the psychological, physiological, and social effects of long hours upon the worker and upon society in general. Here the knowledge of the law will not throw so much light on the problem as a knowledge of man's physical equipment and his behavior under various working conditions.

The constitutionality of laws regulating hours of labor have been upheld in a great many cases. One of the first was that of *Holden v. Hardy*<sup>1</sup> decided in 1898. The legislature of Utah had passed a law prohibiting the employment of workmen in underground mines and smelters for more than eight hours per day. In recognizing such legislation as a valid exercise of the police power the court said, "While the general experience of mankind may justify us in believing that men may engage in ordinary employments more than eight hours per day without injury to their health, it does not follow that labor for the same length of time is innocuous when carried on beneath the surface of the earth, where the operator is deprived of fresh air and sunlight and is

<sup>1</sup> 169 U. S. 366.

frequently subjected to foul atmosphere and a very high temperature, or to the influence of noxious gases, generated by the processes of refining and smelting."

Seven years later in an important decision,<sup>1</sup> and one which has been severely criticized, the Supreme Court declared unconstitutional a statute enacted by the legislature of New York which prohibited employees in bakeries or confectionery establishments from working more than ten hours a day or more than sixty hours per week. Said the court, "Clean and wholesome bread does not depend on whether the baker works but ten hours per day or only sixty hours per week. . . . In our judgment it is not possible to discover the connection between the number of hours a baker may work in the bakery and the healthy quality of the bread made by the workman. The connection, if any exists, is too shadowy and thin to build any argument for the interference of the legislature." To these statements many careful students of the laws of health vigorously object. They insist that long hours affect the health of the worker and therefore effect the wholesomeness of the product, and that a ten-hour day is as long as bakers may safely work. Four of the judges of the Supreme Court, believing that there is a reasonable connection between public health and a ten-hour day in bakeries, refused to accept the majority decision. The difference of opinion between the five judges who held the New York law unconstitutional and the four who believed it to be a valid exercise of the police power did not involve matters of law, but rather difference of viewpoint as to the effect of longer hours upon public health.

The *Lochner* case was overruled twelve years later in the case of *Bunting v. Oregon*.<sup>2</sup> An Oregon law pro-

<sup>1</sup> *Lochner v. New York*, 198 U. S. 45.

<sup>2</sup> 243 U. S. 426.

hibited employees in mills and factories from working more than ten hours a day. The law allowed overtime not to exceed more than three hours a day, but compelled the employer to pay one and one-half times the regular wages for hours worked overtime. The law was upheld in a decision which did not even mention the *Lochner* case. Three of the judges refused to concur in the opinion, but made no statement as to their reasons. The Oregon law applied to industries which were not peculiarly dangerous to health and the decision shows a marked change in the attitude of the court toward laws regulating hours of labor. While this change may have been due in part to changes in the personnel of the court, five of the judges who heard the *Bunting* case having been appointed since the *Lochner* decision, it is also likely that the changing attitude of public opinion toward labor regulation had its effect upon the court. The court had already several years before the *Bunting* case upheld an Oregon statute limiting the working day for women to ten hours.<sup>1</sup> In a recent decision <sup>2</sup> a New York law prohibiting the labor of women at night was upheld.

The constitutionality of minimum wage laws seems to be in doubt. In 1917 the court upheld such a law enacted by the Oregon legislature applying to women,<sup>3</sup> but in 1923 a federal minimum-wage law applying to women and children in the District of Columbia was held to be an unconstitutional deprivation of individual liberty.<sup>4</sup> The latter opinion was vigorously opposed by three members of the court, including Chief Justice Taft. Two years later the minimum-wage law of Arizona was

<sup>1</sup> *Muller v. Oregon*, 208 U. S. 412.

<sup>2</sup> *Radice v. New York*, 264 U. S. 292.

<sup>3</sup> *Stettler v. O'Hara*, 243 U. S. 629.

<sup>4</sup> *Adkins v. Children's Hospital*, 261 U. S. 525.

declared unconstitutional on the basis of the decision in the District of Columbia case. It hardly seems possible, however, that this will be the permanent attitude of the court. There is little doubt but that as public opinion recognizes the benefit which society derives by protecting certain types of workers against underpayment the court will be willing to concede a reasonable relation between minimum-wage legislation and public welfare. On the other hand, if researches into labor problems should make it clear that such legislation is not necessary to public welfare, any laws prohibiting underpayment would be taking liberty without due process. That is, the question of what is due process in the matter of labor legislation, as well as in other fields where the police power is exercised, depends on the interpretation of economic and social facts rather than on legal principles.

Another type of law protecting the laborer is that which provides compensation for workmen and their dependents in case of death or injury as a result of performing their regular duties in connection with the industry, or establishment, by which they are employed. Such laws have been repeatedly upheld. It is not an unconstitutional interference with the liberty or property of the employer to compel him to compensate for the losses sustained by an employee, or his dependents, by the death or disability of such employee when such a misfortune is due to accidents happening in the course of the day's work.

Under the common-law rules of procedure an employer has three different defenses which he may bring in case he is sued for personal injury by any of his workmen. In the first place, he may set up contributory negligence. He may insist that the workman who is injured was himself to blame because of carelessness or negligence. In

the second place, he may set up negligence of a fellow servant. That is, the employer may try to prove that the injury was due to carelessness on the part of another workman and that therefore he (the employer) should not be held liable for damages. Before the advent of the factory system this was often a reasonable defense. With a small group of laborers working in close proximity it might happen that the negligence of one of the group might be the direct cause of injury to another. With the modern complex industrial system, however, it is hardly fair to allow the industry to escape all liability for an accident on the ground that somewhere in the system certain employees have been negligent. For a railroad company, for example, to say that it should not pay for injuries suffered by a locomotive engineer because such injuries were caused by the negligence of a telegraph operator a hundred miles away seems hardly fair. In the third place, the employer, when sued for damages by an injured workman, may under the common-law rule set up the assumption of risk. By this is meant that the workman in entering upon a given employment recognizes the dangers involved in it and assumes the risk.

Under the typical workmen's compensation law the employer is prohibited from using any of these defenses. In other words, if he refuses to pay the amount of damages—this amount usually being fixed by an industrial commission or a similar agency—and the employee brings suit, it will be of no avail to the employer to argue that the accident was due to contributory negligence on the part of the injured workman, or that it was due to negligence on the part of some fellow workman, or that the claim should not be paid because the employee and not the employer assumed the risk. At first sight it might seem that to take these defenses away from the



employer would be an unconstitutional deprivation of his rights. The Supreme Court, however, has clearly stated that the employer has no constitutional right to these rules of procedure, and that neither his liberty nor his property is taken without due process by a law which denies him these three common law defenses.

It is constitutional to compel all employers to contribute to a common fund to be used for the payment of damages for industrial accidents. In fact, the Supreme Court has been entirely willing to accept various types of workmen's compensation laws. Here again we have a recognition of the close relation between public welfare and such legislation. Because of this relation the state may exercise the police power in such a way as to interfere with the liberty and property of the employer and the employee without violating the due process clause.

Employment agencies may be constitutionally regulated under the police power. This is because of the close connection between such enterprises and public welfare. The regulation, however, must not be so severe as to make the existence of such agencies impossible. A few years ago the Supreme Court declared a law of the state of Washington null and void because it prohibited employment agencies from collecting any fees from those who were looking for work.<sup>1</sup> It is obvious that such a rule would put the agencies out of business, and, as they are legitimate enterprises, such severe regulation would mean a taking of liberty and property without due process.

Some very interesting questions have arisen as to how far the police power may be exercised in prohibiting employers from discriminating against workmen who belong to labor unions. In 1898 Congress passed a law

<sup>1</sup> *Adams v. Tanner*, 244 U. S. 590.



making it a misdemeanor for any interstate railroad company to discriminate against any employee because of membership in any labor organization. When a Mr. Adair, an agent of an interstate carrier, discharged a workman because of membership in a labor union, he argued that the law prohibiting such discrimination was in violation of the due process clause in that it interfered with the liberty of the employer to discharge his employees whenever he so desired. The Supreme Court, when the question came before it in 1908, agreed with Adair and held this particular provision of the law unconstitutional.<sup>1</sup> In other words, the court believed that it was taking away the liberty of the employer to forbid him from discriminating against members of a labor union. Two of the judges, in dissenting from this decision, called attention to the fact that the economic inequality between the individual workman and the employer, who is frequently a large corporation, makes it desirable for the workmen to band themselves together for purpose of collective bargaining.

A similar question was decided seven years later in the case *Coppage v. Kansas*.<sup>2</sup> The Kansas legislature passed an Act making it unlawful for any employer to require his employees to make an agreement to abstain from membership in a labor union. The purpose of this law was to protect the labor unions against hostile employers. Was this Act an unwarranted interference with the liberty of contract of the employer? Clearly, it forbade him from making certain conditions for entrance into his employ. The court, following the precedent established in the Adair case, held that the law was a violation of the due process clause in that there is no reasonable relation between such a restriction upon

<sup>1</sup> *Adair v. U. S.*, 208 U. S. 161.

<sup>2</sup> 236 U. S. 1.

the liberty of the employer and public welfare. Three of the judges dissented from this decision, taking the same position as the dissenting judges in the *Adair* case. As the matter now stands, any law which forbids an employer from discriminating against members of labor organizations is null and void.

REGULATIONS IN THE INTEREST OF PUBLIC MORALS.—Any regulation which is necessary to protect the morals of the public is valid even though it may interfere with the life, liberty, or property of the individual. Here again the law is plain: the difficulty arises in drawing the line between laws which are needed to protect morals and those which are not. One of the best known cases dealing with the exercise of the police power in the interest of morals is *Mugler v. Kansas*.<sup>1</sup> Over forty years ago the state of Kansas passed a law prohibiting the manufacture and sale of intoxicating liquor. The brewers in the state contended that this law deprived them of property rights in plants and equipment which had been erected and installed while it was lawful to make beer. Here the Supreme Court faced squarely the question as to whether an industry may constitutionally be destroyed under the police in spite of the due process clause, if its continuance is a menace to the public welfare, even though it has been built up and developed with the sanction of the law. The decision rendered in 1887 made it clear that the due process clause would not protect the liquor business. Because of the Eighteenth Amendment, this case has now only historical interest as far as the liquor traffic is concerned. But it still stands as a precedent for allowing the complete prohibition of any industry which is inimical to public welfare. If, for example, it could be shown that the tobacco evil is a menace, even approaching that of liquor traffic—

<sup>1</sup> 123 U. S. 623.

which, of course, is not likely to happen—the Mugler case would be a precedent for its complete prohibition. While the complete prohibition of tobacco would in all probability be held unconstitutional because of the lack of close relation between such restrictions and public welfare, it would nevertheless be constitutional to regulate the tobacco traffic to a certain degree. Laws prohibiting its sale to minors would be a valid exercise of the police power. The prohibition of the manufacture and sale of habit-forming drugs is valid on the basis of the principles laid down in the Mugler case. Laws respecting the manufacture and sale of drugs, liquor, and tobacco are, of course, designed in many cases to protect public health as well as public morals. It should be borne in mind that when a business is of such a nature that it may be completely prohibited, the government may, if it wishes, permit the continuance of the business under such conditions as it may care to impose. In other words, what a government may prohibit it may also permit under hard terms.

Gambling is recognized as a demoralizing activity, and its prohibition or regulation is clearly within the scope of the police power. The prohibition against lotteries is a good example of anti-gambling restrictions. Legitimate speculation may not be forbidden, but sale of stocks on margin may be made unlawful. Dealing in futures and in options also may be restricted. Games and contests may be regulated in the interest of public morals, especially in cases where betting is likely to occur. Places of amusement, which are not nuisances in themselves, may be regulated or suppressed if there is reason to believe that they may have a demoralizing effect. In 1908, a California city pursuant to authority granted it by the state legislature prohibited the keeping of billiard and pool halls for hire. In upholding this

ordinance the Supreme Court said, "That the keeping of a billiard hall has a harmful tendency is a fact requiring no proof. . . . The fact that there had been no disorder or open violation of the law does not prevent the municipal authorities from taking legislative notice of the idleness and other evils which result from the maintenance of a resort where it is the business of one to stimulate others to play beyond what is proper for legitimate recreation." <sup>1</sup>

Laws enacted for the purpose of prohibiting or regulating sexual immorality are within the police power. A case in point arose in New Orleans, where the city under proper authority from the state passed an ordinance prohibiting prostitutes from living outside of certain prescribed areas. The Supreme Court upheld this legislation,<sup>2</sup> in spite of the protests of property-owners within these areas who insisted that severe property losses were sustained because of such legislation. Houses of ill fame may be entirely prohibited, although it would no doubt be unconstitutional to provide for the destruction of buildings which are used for immoral purposes, as the same buildings are capable of being used for a lawful purpose. Obscenity of any sort may be regulated even though such regulation may interfere with the liberty and property of individuals.

In the interests of public morals, any game or sport which has a brutalizing effect either on the participants or on the spectators may be prohibited. Prize fights may be prohibited, as may also bull fights and cock fights. Moving pictures of brutal or inhumane games or activities may be constitutionally prohibited, as may also the public exhibition of notorious persons the exhibition of whom would have a bad effect on public

<sup>1</sup> *Murphy v. California*, 225 U. S. 623.

<sup>2</sup> *L'Hote v. New Orleans*, 177 U. S. 587.

morals. All public exhibitions may be subjected to censorship. This is especially true of the theater and moving pictures.

REGULATIONS IN THE INTEREST OF PUBLIC SAFETY AND ORDER.—Closely related to laws regulating conduct, to protect public health and public morals, are those which are enacted in the interest of safety and order. To eliminate fire risks, property-owners may be compelled to use fire-proof materials in the erection or in the repair of buildings within zones where the fire hazard is the greatest. In at least one case<sup>1</sup> the Supreme Court has gone so far as to uphold regulations requiring the actual demolition of wooden buildings. Such extreme treatment, of course, is proper only when the conditions are such that the tearing down of wooden buildings is necessary to public safety.

A striking illustration of how far the legislature may go in guaranteeing public safety is afforded by the law passed in Illinois to protect property-holders against damage done by mobs and riots. The law in question provided that any damage suffered at the hands of a mob of twelve or more persons should be paid for by the city or county in which the property was situated to the extent of three-fourths of the injury actually suffered. This law was upheld as a valid exercise of the police power.<sup>2</sup> The sale and use of firearms may be closely regulated.

For the purpose of avoiding inter-racial conflicts, laws have been passed which compel the use of separate coaches on trains for whites and blacks. Negroes may also be compelled to attend separate schools. While laws are often passed in order to give whites preference, there is no doubt that such segregation may, in some lo-

<sup>1</sup> *Maguire v. Reardon*, 255 U. S. 257.

<sup>2</sup> *Chicago v. Sturges*, 222 U. S. 313.



calities, at least, be conducive to public order. Such laws have been upheld. On the strength of these precedents, the city of Louisville passed an ordinance prohibiting negroes from moving into any city block where the majority of occupants were white. Whites were also prohibited from moving into blocks where blacks predominated. Here was a clear case of interference, not only with liberty, but with property as well. Under the ordinance no property-owner in the city was allowed to sell or lease his property to a member of the race which was in the minority in the particular block where such property was situated. The purpose of the ordinance on the face of it was "to preserve the public peace" by making race conflict less likely. Nevertheless, it was obvious that this was an attempt to restrict negroes to certain sections of the city. When the matter came before the Supreme Court in 1917 the ordinance was declared unconstitutional<sup>1</sup> as interfering with rights of property in violation of the due process clause. The interference with individual rights under this ordinance was more marked than under laws segregating the races in schools and railway coaches. Evidently the court felt that the relation between public safety and such severe restrictions on the use of property was not clear enough to be called due process. In this view the court has the support not only of those who on moral grounds may oppose the segregation of black, but of careful students of constitutional law. Here, as in other cases involving the police power and due process, the issue resolves itself into a question of whether the restrictions imposed bear a reasonable relation to public welfare.

Railroads are so closely related to public safety that many restrictions have been imposed upon their opera-

<sup>1</sup> *Buchanan v. Warley*, 245 U. S. 60.



tion. Trains may be compelled to slow down in passing through cities and villages. A crew of sufficient size to protect the public against accident must be carried. The use of stoves for heating railroad cars may be forbidden. In the state of Georgia a particular type of headlight was prescribed for all locomotives. As this compelled the abandonment of the old lighting equipment and the substitution of new headlights, it was argued by the railroad companies that such legislation deprived them of liberty and property without due process. The Supreme Court, however, upheld the law on the ground that the headlight requirement was a reasonable requirement made in the interests of public safety.<sup>1</sup> The Georgia law was also attacked as being an interference with interstate commerce, but the court, following the principles discussed in Chapter VI, held that, in the absence of congressional action, and due to the fact that uniformity is not necessary in the use of headlights, the state was within its rights. On this point the court said that "in the absence of legislation by Congress the states are not denied the exercise of their power to secure safety in the physical operation of railroad trains within their territory, even though such trains are used in interstate commerce."

The transportation of explosives and inflammable material may be subjected to very severe restriction. Even the storage of such commodities may be closely regulated. Laws absolutely prohibiting the storage of gasoline near a dwelling have been upheld.<sup>2</sup> Traffic rules of all sorts are excellent illustrations of interference with liberty and property in the interest of public safety. Every traffic rule must meet the test of reasonableness. A restriction upon traffic which in all common sense has no

<sup>1</sup> Atlantic Coast Line Ry. Co. v. Georgia, 234 U. S. 280.

<sup>2</sup> Pierce Oil Corporation v. Hope, 248 U. S. 498.

connection with public welfare is a violation of due process.

**REGULATIONS IN THE INTEREST OF ECONOMIC WELFARE.**—The biggest problem under this head is the regulation of rates and services of public utilities. By public utilities we mean those businesses which are of such a nature that the general public has a vital interest in them. This vital interest is usually due to the fact that such enterprises furnish commodities and services like water, light, transportation, telephones and telegraphs which are semi-public in their nature. Such commodities and such services cannot economically be furnished by the individual. It is better to turn their production over to concerns which specialize in these particular lines. In the interests of economy it is usually wise to give one concern a monopoly of the field. It would obviously be wasteful to have two competing water companies in the same city duplicating equipment and having a double set of water mains running down each street. It is much wiser to give one corporation all of the business. But, if a private concern is given the right to furnish water to a community, it is obvious that such a concern must submit to regulation in the public interest. Not only must pure water be furnished in the interest of public health and an adequate supply be available to fight fires, but the water company may be compelled to give prompt service at a reasonable rate to all who ask for it. The same is true of all public utilities.

In most cases monopoly is found in public utilities, but not always. In industries vitally touching the general public the regulation of rates and services may be desirable even where there is competition. When a monopoly in public or semi-public services exists there is a special need for regulation. Sometimes the monopoly is the result of a special grant, as is usually the case

with a water, electric light, or street-car company. At other times the monopoly may result from the general economic situation. A railroad serving a certain section may have a virtual monopoly because of the impossibility of interesting capital in the building of a competing railroad.

The fundamental principle in connection with the regulation of rates and services, then, is that a business which, to use the words of the court in *Munn v. Illinois*,<sup>1</sup> becomes "clothed with a public interest," may be compelled to furnish standard services at rates which will offer a fair return on the investment in addition to paying operating expenses. If the rate fixed is so low as not to give a fair rate of return on the investment after the operating expenses are paid, then such a rate is a violation of the due process clause, for it results in a taking of the property of the public utility. If a street-car company, for example, is compelled to carry passengers for fares so low that it operates at a loss, it may object to such a low rate on the basis of the due process clause.

Thus, the question of the constitutionality of regulations, prescribing rates for public utilities, becomes largely a matter of accounting. As soon as a rate is so low as to become confiscatory, it is unconstitutional; but to decide whether it is confiscatory involves a determination of the value of plant so that a basis for the fair return may be known. Furthermore, it involves a scrutiny of the entire operating process to see that the business is carried on with a proper avoidance of waste. Here again the legal principles are comparatively simple. All confiscatory rates are a violation of the due process clause. The difficulties arise in discovering which rates are confiscatory and which are not.

<sup>1</sup> 94 U. S. 113.

In determining a fair value of property upon which a return must be allowed, many questions arise. In the valuation of a plant the method frequently used is to base such valuation on what it would cost to reproduce the plant less depreciation. The value of the site is determined by comparison with adjoining realty. Such methods have been upheld in several cases. The cost of getting a business started—usually called a going concern—may be included in the valuation of a plant. To take what the plant actually cost is not always fair. On the one hand, it may be unfair to the consuming public, as the original cost may have been too high, due to poor management. On the other hand, such a basis may be unfair to the owners of the utility because of a legitimate rise in property values which may make the original cost much below the cost of reproduction. To use capitalization is also undesirable, as a rule, because the plant may easily be overcapitalized. What the due process clause guarantees is not a return on actual investment nor on capitalization, but on the value of the plant as used for public-service purposes. When a public utility contends that a fixed rate is so low as to be unconstitutional, the proof offered by the utility to substantiate its contention as well as the proof submitted by those opposing a raise of rates to show that the rate is already high enough to pay operating expenses and to yield a return on investment, does not involve a complicated statement of legal principles, but an array of statistics and accounting data. In such a case, a knowledge of public-utility operation and a clear understanding of the principles of accounting are as necessary as a knowledge of the law.

The regulation of rates and services of common carriers, electric, gas, water, telephone, and telegraph companies, is clearly recognized as being within the police

power. Other enterprises, too, have been subjected to regulation. Thus, when the Kansas legislature of 1909 provided by law for the regulation of rates to be charged by fire insurance companies, the law was upheld by the Supreme Court.<sup>1</sup> In this case no monopoly was involved, but the court held that the business of fire insurance was of such a nature that its regulation was proper in order to protect the economic interests of the public.

Probably the best known case, as well as the first important one involving the constitutionality of rate regulation, is that of *Munn v. Illinois*.<sup>2</sup> The legislature of Illinois fixed the maximum rates to be charged by elevators and warehouses in Chicago for the storage of grain. The warehouse owners contended that this was a taking of their property. The court, however, held that, as the warehouses were indispensable agencies in the transportation of grain, they were properly subject to regulation. In a statement which has become classic the court said, "When one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created."

The state of Kansas in 1920 established a court of industrial relations with power to settle labor disputes in all industries affected by a public interest. In addition to public utilities and common carriers, all industries engaged in the manufacture or preparation of food, clothing, or fuel were declared to be so affected. When the validity of the act was challenged, the fundamental issue was whether producers of food, clothing, and fuel had in reality such a close relation to public welfare as to warrant so great an interference with their liberties

<sup>1</sup> *German Alliance Co. v. Lewis*, 233 U. S. 389.

<sup>2</sup> 94 U. S. 113.



and the liberties of their employees as to introduce the compulsory settlement of labor disputes arising in these industries. The test case was brought by a meat-packing plant, and the Supreme Court held the law invalid as far as applied to such industry.<sup>1</sup> That is, the court was of the opinion that the industries producing food, clothing, and fuel were not clothed with a public interest to a degree which made it necessary to exercise police power to the extent of compulsory arbitration of labor disputes. Whether compulsory arbitration may be used in case of public utilities has never been passed on directly by the Supreme Court.

During the World War, when the heavy demand for housing facilities exceeded the supply, it became necessary to protect tenants by providing that they could not be evicted if they offered to pay reasonable rent, even though such rent was below what the landlord demanded. In effect this amounted to fixing the rate of rental. Such laws were upheld as emergency war measures. Whether they would be valid in times of peace is a question which has not as yet been squarely answered. Some of the rent legislation remained in effect for a long period after the close of the war and none of it was declared invalid.

The protection of the public against fraud is the purpose of many types of laws, all of which are constitutional whenever they are necessary to protect the economic interests of the public, even though, incidentally, there may be interference with liberty and property. The use of trading stamps has been prohibited and such prohibition has been upheld, not because there is direct fraud in the use of trading stamps, but, rather, because such use may indirectly be seductive in its nature. Laws prohibiting the sale of adulterated goods and goods col-

<sup>1</sup> Wolff Co. v. Industrial Court, 262 U. S. 522.

ored, or otherwise treated, so as to deceive the purchaser, are constitutional even though they are not necessary to protect health. The public has a right to protection against fraud and deception in business dealings, even though such deceit has no evil effects on health, safety, or morals.

The sale of stocks and bonds by overzealous promoters easily lends itself to wholesale deception of the public. This possibility has led to the enactment of the so-called "blue-sky" laws which regulate very closely the sale of securities. Such laws have been upheld as a valid exercise of the police power and are not in violation of the due process clause.

In order to protect depositors against bank failures, the legislature of Oklahoma in 1907 went farther than any state in enacting a law which provided that all banks in the state should pay an assessment based on average daily deposits into a fund, which was to be used to pay the losses to depositors in case any bank became insolvent. The law was bitterly opposed by many of the bankers of the state. They maintained that the compulsory assessment of solvent banks to protect depositors in other banks was a taking of property without due process. The Supreme Court, however, took the stand that such legislation was valid, in view of the fact that its purpose was to protect depositors against fraud and against loss due to dishonesty or mismanagement in connection with the banking business.<sup>1</sup>

To summarize, the police power may be widely exercised in spite of the Fourteenth Amendment. The due process clause does not stand in the way of any regulations which are necessary to protect public health, morals, safety, or economic welfare. If any regulation

<sup>1</sup> *Noble State Bank v. Haskell*, 219 U. S. 104.

is attacked on the grounds that it conflicts with due process, it is incumbent on the person making such an attack to show that the regulation questioned has no reasonable relation to the public purpose which it is intended to serve.

## CHAPTER XII

### EQUAL PROTECTION OF THE LAW

**PURPOSE AND SCOPE OF THE EQUAL PROTECTION CLAUSE.**—Immediately following the due process clause the Fourteenth Amendment contains the provision that no state shall “deny to any person within its jurisdiction the equal protection of the law.” This prohibition upon the states overlaps to some extent with the due process clause. In many instances, a denial of equal protection involves also a deprivation of rights without due process. For example, a statute prohibiting colored persons from selling groceries at retail would not only be a denial of equal protection to members of that race, but would also be taking the liberty of such persons without due process. As a matter of fact, there is not much need for drawing careful distinctions between the due process and the equal protection clause. Both are prohibitions against state action and in many cases it matters little whether it be a lack of due process, or a denial of equal protection, which is the basis for an attack upon a law. If the law violates either clause, it is invalid. In a large number of cases the courts discuss due process and equal protection much as though these two clauses constitute supplementary portions of one prohibition. In this connection it should be noted that, while the equal protection clause does not apply to the Federal government, the due process clause of the Fifth Amendment covers a part, at least, of the same field.

The chief, if not the only, reason for the inclusion of the equal protection clause was the realization that many

of the states might be tempted to enact legislation discriminating against the recently freed slaves. As a matter of fact, much discriminatory legislation had already appeared before 1868—the year in which the Fourteenth Amendment went into operation. But the clause has been held to cover a much greater field than merely discriminations against the negro. It does do that, but it does a great deal more.

It is because of the equal protection provision that “class legislation” is invalid. By “class legislation” is meant any attempt to classify persons unreasonably, and to apply a different rule of law to one class than to another; and a great number of cases involving “class legislation” properly have been brought to the Supreme Court which have had nothing whatever to do with unfair discrimination against the negro. Naturally, equal protection also relates to discrimination against races other than blacks.

TO WHOM IS THE PROHIBITION OF THE EQUAL-PROTECTION CLAUSE DIRECTED?—There is nothing in this provision which prohibits any private individual from showing unfair discrimination against races or other classes or groups. It is the several *states* which are prevented from denying equal protection. For example, it would be invalid for a state to compel negroes to ride in separate coaches on railroad trains unless the same rule applied also to white persons, but there is nothing in the equal protection clause to prevent a railroad company, on its own initiative, from discriminating against colored persons by compelling them to use certain coaches, even though the railroad has no such rule for white people. Because the state may not unfairly discriminate against persons or classes, it follows, naturally, that any official act of any representative of the state or its subdivisions which denies equal protection of the



law is unconstitutional. Not only is it in violation of the equal protection clause when an official makes unfair discriminations because he is required to do so by law (for such a law itself is unconstitutional) ; but it is also a violation when a state official misuses his authority, or acts without authority, in such a manner as to deny equal protection of the law.

WHAT PERSONS AND WHAT RIGHTS ARE PROTECTED?—By the words of the Constitution the equal protection clause applies to *all* persons within the jurisdiction of the state. Any person who is actually within the borders of the state is protected—regardless of color, class, or creed. Furthermore, aliens in the state are also protected, and any state action which discriminates against them arbitrarily and unfairly is unconstitutional. This does not mean that aliens may not be denied political rights, neither does it prevent legislation against aliens when such legislation has a reasonable basis. At least one instance of such legislation will be noted in a later paragraph. The federal government, of course, may in some instances, by legislation or treaties, regulate the conduct of aliens differently from that of citizens.

Corporations are considered to be persons and are protected against unfair discrimination just the same as individuals. Any corporation organized in accordance with the laws of the state is within its jurisdiction. The same is true of corporations organized under the laws of other states, of the federal government, or of foreign countries, which have been admitted to the state. Any discrimination against outside corporations may, as pointed out in a previous chapter, also involve an unconstitutional interference with interstate commerce.

Not all rights are protected by the clause under discussion. A state may discriminate between classes as to voting privileges and as to qualifications for holding

office. These are usually called political rights, and a denial, for example, of the right to vote or to hold office to those who do not own property or on any other basis is not a denial of equal protection of the law. Discrimination, as to suffrage on the basis of race or of sex, would, of course, as pointed out in the next chapter, be a violation of the Fifteenth and Nineteenth Amendments, respectively. Any other discrimination as to suffrage, however, would be valid. But when we come to non-political, or civil rights and privileges, there must be no unfair discrimination. One of the leading cases involving the equal protection clause is that of *Barbier v. Conolly*.<sup>1</sup> In discussing the effects of this clause, the court said "that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuit of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice, no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses." Here we have an enumeration of civil rather than political rights. Under most circumstances it is his civil, rather than his political, rights in which the average citizen is interested. We would probably object vigorously if we were denied the right to vote or to hold office, but we could possibly live very

<sup>1</sup> 113 U. S. 27.

comfortably without these privileges. An unfair discrimination in civil rights, however, such as those relating to owning and inheriting property, buying and selling goods, making contracts, marrying, engaging in a chosen occupation, easy access to courts of justice and so forth, might bring great and immediate hardship.

IS ALL DISCRIMINATION FORBIDDEN?—It will be noted that in the above discussion we have been careful to speak of unfair or arbitrary discrimination, rather than all discrimination, as being unconstitutional. There are many forms of discrimination which are inevitable. There are reasonable differences between different groups and classes which make it desirable and even necessary to legislate differently for one than for the other. It might, for example, be desirable to require certain standards of all who wish to drive motor cars, which would be unnecessary in the case of drivers of horse-drawn vehicles. Such a discrimination would be a reasonable and a constitutional one. If there are certain evils in several lines of industry, it is valid, in an endeavor to mitigate those evils, to pass regulatory laws directed at those lines of industry where the evils are more prevalent. Carelessness and a lack of safety devices are evils in many forms of industry, but to compel all manufacturers of explosives, for example, to take precautions to protect their workmen, which precautions are not required of other manufacturers, would be valid even though there may also be some need for protection in less dangerous industries. Again quoting from *Barbier v. Connolly*, we find the court saying, "Regulations for these purposes (the public welfare) may press with more or less weight upon one than another, but they are designed not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little individual inconvenience as possible, the general good."

Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same conditions and circumstances. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

The main issue in the great mass of cases which have arisen under the equal protection clause is whether the discrimination imposed on a class of persons or property is a fair and reasonable one. If the state action, which is attacked as unconstitutional, goes farther than discrimination and involves an actual taking of life, liberty, or property, then it is a question of whether the due process clause rather than the equal protection clause has been violated. The questions which have arisen under the equal protection clause may be divided into two great classes. First, there are those which involve unfair and unreasonable discriminations through the exercise of the police power. It is in connection with discriminations of this type that the term *class legislation* is frequently used. Under this head have arisen a great many questions involving race discrimination. In the second place, there are the cases involving classification for purposes of taxation. The remainder of this chapter, then, will be devoted to a discussion of the equal-protection clause under three heads: first, class legislation generally; second, class legislation involving race discrimination; and, third, classification for purposes of taxation.

**CLASS LEGISLATION UNDER THE POLICE POWER.**—As pointed out in the preceding chapter, the police power includes those activities of a government which are necessary to promote and protect health, morals, safety, and

the economic welfare of the general public. Any police regulation which deprives any person of life, liberty, or property violates the due process clause, unless such deprivation is necessary to promote the objects above mentioned. But the equal protection clause goes still further. Not only must there be a reasonable relation between the regulation and any of the objects above listed, but the regulation, even though it be desirable, must not discriminate arbitrarily between different classes. No matter how clearly such a regulation may serve a legitimate public purpose, it will not stand if its provisions deny equal protection of the law.

A great many health regulations have been challenged on the ground that they applied only to certain classes of persons or property and hence denied equal protection. A New York law compelled all those engaged in the sale of milk to fulfill certain requirements. Was this an unfair discrimination against persons engaged in such a business? One man might be a retailer of milk, his neighbor a vender of vegetables. The first is compelled to obey restrictions not imposed on the other. Is such a law discriminatory? The Supreme Court held that it is entirely constitutional to put milk dealers in a class separate from other businesses.<sup>1</sup> There is a reasonable difference between such enterprises and other forms of trade. Indeed, it is even legitimate to regulate the sale of milk without regulating the sale of other foods because of the closer relationship between milk and public health than exists in the case of other foodstuffs. In Milwaukee a city ordinance compelled all milkmen bringing milk from outside the city limits to satisfy certain standards, which standards were not required where milk was produced in the city. This ordinance was attacked as making an unreasonable distinction be-

<sup>1</sup> New York *v.* Van de Carr, 199 U. S. 552.



tween herds within and herds outside the city limits. When the matter came before the Supreme Court, however, it was held that such a classification was proper, and therefore constitutional.<sup>1</sup> In other words, the court was of the opinion that it was not unreasonable to scrutinize more carefully a more distant source of milk supply.

In Nebraska a statute was passed providing that all hotels having more than fifty rooms must provide night watchmen. Here was a twofold classification of the hotels of the states, the basis being the number of rooms, and the purpose being to protect the safety of the public by the regular employment of night watchmen. Does such a law constitute class legislation, or is there, from the common-sense viewpoint, any basis for such a classification of hotels? The law was attacked by the larger hotels as a denial of the equal protection, but the Supreme Court refused to nullify it and held to the view that such a discrimination was not an unreasonable or an arbitrary one.<sup>2</sup>

A law may regulate the manufacture and sale of preservatives, singling them out from other commodities. Obviously there are special reasons for scrutinizing most carefully the activities of those who are engaged in the production or distribution of commodities fraught with such danger to public health as are the various kinds of food preservatives; and such persons are denied no constitutional protection when they are separately classed for purposes of regulation.

Closely allied to public health and to public safety is the licensing of occupants. There are some trades and occupations which have so little to do with public welfare that it has not been felt necessary to license those who wish to engage in them. Other occupations and

<sup>1</sup> *Adams v. Milwaukee*, 228 U. S. 572.

<sup>2</sup> *Miller v. Strahl*, 239 U. S. 426.

professions are, on the other hand, so intimately connected with the public weal that high standards of admission may be set up. Such discrimination, at times, approaches class legislation; at others it is obviously a fair distinction.

One man, a barber, for example, is subjected to detailed regulation; another, a tailor, for example, is entirely free from legal restrictions regarding the details of his work. Any complaint on the part of the barber that he is denied the equal protection of the law would get no support in the courts because of the closer relation which the barber has to the public health than does the tailor. When it comes to those professions which are directly engaged in ministering to public health, such as physicians, dentists, and nurses, the state may require standards very different from those required of callings less intimately connected with public welfare. It is also constitutional to put other callings, such as the law, into a separate class, and set high standards which must be met by those wishing to be admitted into it.

In the case of *Barbier v. Connolly*,<sup>1</sup> from which quotations have already been made, the question was raised whether night work in laundries, which were located in certain sections of the city, might be prohibited without violating the equal protection clause. The board of supervisors of San Francisco, under authority given them by the state of California, provided by ordinance that no owner or employee of any public laundry located within the prescribed limits should wash or iron clothes between the hours of ten in the evening and six in the morning. It was vigorously claimed that this ordinance denied the equal protection of the law, first, to those engaged in the laundry business as against other industries, and, second, to those engaged within the prescribed

<sup>1</sup> 113 U. S. 27.

limits as against those outside of it. In other words, this ordinance was twice guilty of denying equal protection. Here, as in every case involving class legislation, the question resolves itself into a consideration of whether the classification is based on common sense. Is there any sense in applying a rule to night work in laundries which is not applied to other industries? Is there any sense in applying a stricter rule to certain localities of the city of San Francisco than to others? Both of these questions the court answered affirmatively. From the nature of the work done in laundries it was necessary, in order to reduce the fire hazard, to prohibit washing and ironing during the night hours. Furthermore, it is clearly constitutional to set off certain limits within which a fire would be more likely to originate, or in which a fire would be more likely to be highly disastrous, than in other portions of the city. To divide the real estate of the city into classes on this basis is not unfair. Building zones are not a denial of equal protection as long as the boundaries of such zones bear a reasonable relation to fire hazard.

A highly interesting case, involving the equal protection clause, arose in Pennsylvania as a result of a law enacted in 1909 by the legislature of that state which made it unlawful for an alien to kill any wild bird or animal, and, going still further, even made it unlawful for an alien to own, or have in his possession, a shotgun or a rifle for the purpose of hunting wild game. Was this a denial of equal protection? As pointed out in an earlier paragraph, aliens within the jurisdiction of the state are protected by this clause as well as citizens. Was there any special reason for putting aliens in a separate class as far as the possession of certain firearms for hunting purposes is concerned? Here we have a

close case. The Supreme Court upheld the statute<sup>1</sup> on the grounds that there seems to be greater need, in order to protect game, to deny aliens hunting privileges than to deny them to citizens. At any rate, the court was of the opinion that, for the purposes of the statute, the classification of persons into aliens and citizens was a proper one and that therefore there was no violation of the equal protection clause.

The equal protection clause does not prevent a state from dividing its territory into districts or subdivisions for purposes of government, nor from passing laws which apply differently to different portions of the state, as long as there is no unreasonable discrimination. The Missouri constitution of 1875 has a unique provision in regard to judicial districts. From most of these districts cases are appealed to the supreme court of the state, while, from the others, cases are appealed to a special court of appeals instead of the supreme court. Furthermore, the court of appeals has final jurisdiction over certain cases. This means that from one portion of the state—which includes St. Louis and vicinity—the court of appeals is the highest court in certain cases. For the rest of the states the supreme court is, as the name indicates, the highest court. Here we have two different types of judicial procedure in the same state. This arrangement was attacked in the case of *Missouri v. Lewis*, but its validity was upheld by the Supreme Court of the United States.<sup>2</sup> In the opinion of the court the residents in one part of the state had judicial remedies fully as adequate as the residents of the other, and hence there was no denial of equal protection of the law.

In the field of criminal law, also, the question of class

<sup>1</sup> *Patsone v. Pennsylvania*, 232 U. S. 138.

<sup>2</sup> 101 U. S. 22.

legislation often arises. In California a law was passed which provided that life convicts assaulting anyone with a deadly weapon should be punished with death. This was a severer penalty than that meted out to other persons guilty of the same offense. Does such discrimination constitute class legislation? The Supreme Court upheld the California law, saying that life convicts form a distinct class for which a more severe punishment for assault may properly be provided.<sup>1</sup> Some states have enacted what are called "habitual criminal" statutes, which provide that persons who have been convicted of felonies a given number of times shall upon the next conviction be considered an habitual criminal and be given a very heavy sentence. Such statutes do not deny the equal protection of the law to those affected, as it applies to all persons who are within the class described.

In the interest of the economic welfare of the public many laws have been passed which treat one class, or group of persons or property, differently from another. Here, as in other fields where there is a conflict, real or alleged, between the police powers and the equal protection clause, the question is one of reasonableness of classification. One of the best known cases under this head is *Lindsley v. Natural Carbonic Gas Co.*<sup>2</sup> A New York statute, in order to protect and conserve the supply of natural carbonic gas of the state, prohibited wasteful pumping of water from wells which were bored into rock containing waters with an excess of this gas, whenever the water was to be used for extracting the gas so that it might be sold separately from the water. The prohibition against pumping extended only to cases where the drawing of water was injurious to other owners who were interested in the same common source of water

<sup>1</sup> *Finley v. California*, 222 U. S. 28.

<sup>2</sup> 220 U. S. 61.



supply. The statute was attacked as class legislation on two grounds: first, that it applied to wells bored into the rock, while other wells not penetrating the rock were not affected; and second, that it applied only against pumping operations where the purpose was to extract the gas from the water. The court held that these classifications were both reasonable. In commenting upon the case the court said that "a classification having some reasonable basis does not offend against that clause (equal protection) merely because it is not made with mathematical nicety, or because in practice it results in some inequality."

Laws have been upheld which regulate hard-coal mining in one way and soft coal in another. Laws which discriminate against owners of sheep as against owners of other cattle in regard to grazing lands are constitutional. Hours of labor for women and children may be regulated even though the hours for men are left unrestricted. One of the most finely drawn distinctions upheld by the Supreme Court was that made in a North Dakota statute which compelled dealers to follow certain requirements in selling lard, which requirements were not applied to other like commodities. The court in this case<sup>1</sup> was convinced that certain practices in regard to the sale of lard made it reasonable to put this commodity in a class by itself.

Railroads have frequently been singled out as a separate class. For some purposes such a discrimination has been upheld; for other purposes it has not. In Texas the legislature passed a law which required railroads to pay damages to the contiguous landowner whenever the railroad company permitted Johnson grass or Russian thistle to go to seed upon its right of way. The law applied only to railroads, and the question naturally arose

<sup>1</sup> *Armour & Co. v. N. D.*, 240 U. S. 510.

in the courts as to whether it was reasonable to subject the railway companies to more rigid rules for weed destruction than other enterprises. If railroads are more likely to neglect the strip of land along the line than are other owners, or, if the seeds of these noxious weeds are more likely to be scattered along railway property by being dropped from passing cars, it is reasonable to place such property in a class by itself in the matter of weed control. The law was upheld as a reasonable classification.<sup>1</sup>

An Arizona statute regulated the hours of labor for women in hotels and restaurants, limiting the number of hours to eight per day, with the added provision that these eight hours must be within a period of twelve hours. Eating-houses on the right of way of a railroad were exempted from the last provision. This, of course, was a singling out of railroad property for favorable discrimination, and the objection came not from the railroads, nor from the railroad restaurants, but from their competitors to whom the added provision applied. When the matter came before it, the Supreme Court held that there was no denial of equal protection involved in the law because there was a reasonable difference between railroad restaurants and others as far as the concentration of hours of labor is concerned.<sup>2</sup> This difference is based on the necessity of railroad restaurants to adjust their hours to train schedules, a problem which need not be faced by other eating-houses. It is evident that, in a few cases, there may be a hardship on individual restaurant owners, such as where one eating-house is located off the right of way, with only a few feet between it and a competitor which has an advantage in fixing its time schedule for waitresses; but a limited number of such

<sup>1</sup> *M. K. T. Ry. Co. v. May*, 194 U. S. 267.

<sup>2</sup> *Dominion Hotel v. Arizona*, 249 U. S. 265.

inequalities is almost inevitable. A law is not invalidated when on the whole the classification is reasonable, even though hardships may result in a few cases.

The state of Georgia provided by law that if a railroad company refused to settle within forty days for loss of, or damage to, goods carried upon its lines, it must pay the full claim as presented by the shipper. Because of the peculiar character of the railroad business this law was held constitutional.<sup>1</sup> The state of Texas went still further and imposed a penalty on railroad companies for nonpayment of small debts which was not imposed on other businesses. The penalty applied not only to loss and damage claims, as was the case in the previous case, but to all debts. Here, said the Supreme Court, was an unfair discrimination against the railways, as there is no greater reason why they, more than other corporations, should be punished for delinquency in the payment of debts.<sup>2</sup>

Workmen's compensation laws have been attacked as being class legislation. In Ohio a state law was attacked as denying equal protection because it did not apply to employers whose employees number less than five persons. Thus, a person employing five or six workmen is subjected to more severe regulation than one employing four or less. The law was held constitutional<sup>3</sup> because the number of employees is a reasonable basis for making the distinction. The line must be drawn somewhere, and, while it may cause a hardship on a few employers just above the line, the classification is, on the whole, a sensible one. A New York law was attacked as class legislation on a different basis. It was contended that, because the law did not apply to domestic servants and to farm

<sup>1</sup> Seaboard Air Line Co. v. Seegers, 207 U. S. 73.

<sup>2</sup> Gulf C. & S. F. Ry. v. Ellis, 165 U. S. 150.

<sup>3</sup> Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571.

laborers, it denied equal protection to employers of other types of labor. To the average person it is clear that the risks involved in these fields are different from industry in general. It is also clear that the more intimate relation which usually exists between employer and employee in domestic and agricultural fields makes the exemption of these two classes of employers a reasonable one. The court held that there was no denial of equal protection to employers in other fields.<sup>1</sup>

One of the most notable cases arising under the equal-protection clause is that of *Truax v. Corrigan*.<sup>2</sup> The question here was whether an Arizona statute which prohibited the use of the injunction in labor disputes, and particularly prohibited its use to stop peaceful picketing, denied the employers equal protection of the law. A certain restaurant in Bisbee, Arizona, had a dispute with the cooks and waiters in its employ which culminated in a strike. The striking employees used various peaceful means to dissuade the public from patronizing the restaurant, and published generally the fact that its owners were unfair to labor. As a consequence the daily receipts of the concern were materially decreased. The owners of the restaurant applied for an injunction to compel the strikers to refrain from such acts as would bring damage to the business. The injunction was refused by the Arizona courts on the strength of the state law which forbade its use in such a situation. The case was appealed by the restaurant owners to the Supreme Court of the United States on two grounds. First, they contended that to deprive them of the right to use the injunction was a violation of the due process clause in that it involved a taking of their property. In the second place, they contended that to deny em-

<sup>1</sup> *N. Y. C. Ry. Co. v. White*, 243 U. S. 188.

<sup>2</sup> 257 U. S. 312.

ployers the right to use the injunction in labor disputes without denying the same right to the employees was a denial of equal protection of the law. By a vote of five to four the court upheld both contentions and the Arizona statute was held null and void. There were three dissenting opinions; one written by Justice Brandeis, another by Justice Holmes, and a third by Justice Pitney with which Justice Clarke concurred. The dissenting opinion of Justice Brandeis is looked upon with great favor by many students of constitutional law. In it he contended that the restaurant owners were not deprived of any property right by the Arizona statute, nor denied the equal protection of the law. The point at issue, as far as the equal protection clause is concerned, is whether it is reasonable to subject employers to such a limitation when it is not imposed upon those who find themselves on the other side of the dispute. The dissenting judges were of the opinion that, in the interests of public welfare, it is desirable to prohibit the use of injunction when its use is sought to further the interests of the employer as against the employee. Of course, the law is determined by the majority opinion, and that opinion, written by Chief Justice Taft, makes it unconstitutional to deny to employers the use of the injunction in labor disputes. Summarizing the cases which we have discussed under this head, it will be noted that the question invariably resolves itself into an examination of the reasonableness of classification. Here, as in the cases involving the police power and due process, the court is compelled, virtually, to decide on the wisdom of the law. Under due process it is a question of how reasonable is the relation between the regulation and public welfare. When the equal protection clause is involved it is a question of whether the discrimination is based on a reasonable difference.



We shall next examine a few of the leading cases where a special type of class legislation, namely race discrimination, is involved, and it will be noted that here too the main question is as to the reasonableness of the classification.

**RACE DISCRIMINATION AND THE EQUAL PROTECTION CLAUSE.**—The Fourteenth Amendment was largely the result of the desire to protect the recently freed negroes against unfair discrimination. It is therefore not surprising that a large number of cases have arisen out of laws which have tried to place blacks on a different footing from whites.

A colored man named Strauder was indicted in 1874 in a West Virginia court, and convicted. According to the laws of that state, all negroes are excluded from jury service, and the convicted man asked for a retrial on the ground that he had been denied equal protection of the law because of the exclusion of members of his race from the jury. The United States Supreme Court held that this request was a proper one and that the West Virginia statute which made it impossible for negroes to do jury duty was a violation of the equal protection clause.<sup>1</sup> This decision does not mean, however, that a negro is entitled to trial by a jury of negroes. It does not even go so far as to make it imperative to include one or more negroes on the jury. It simply means that in making up the jury there shall be no discriminating against a proposed jurymen merely because of the fact that he may belong to the colored race.

The federal government has even gone so far as to prohibit any state official—which, of course, includes judges—from showing any discrimination, in making up jury lists, against any person because of race, color, or previous condition of servitude. Such a statute is based

<sup>1</sup> *Strauder v. West Virginia*, 100 U. S. 303.

on the clause of the Fourteenth Amendment which gives to Congress the "power to enforce, by appropriate legislation, the provisions of this article." Under this law a county judge in Virginia was indicted because in making up the jury lists he had excluded colored persons. The statutes of Virginia made no discrimination against the colored race, but the judge on his own initiative had refused to include blacks on the jury list. His conduct was held to be a violation of the equal protection clause, and the federal statute prohibiting discrimination was held valid.<sup>1</sup>

Many states have enacted legislation compelling colored persons to occupy separate compartments, or carriages, in railroad trains. In many instances, separate schools for blacks have been provided. Probably the best known case on the matter of separate railway compartments is *Plessy v. Ferguson*.<sup>2</sup> The legislature of Louisiana in 1890 passed a law which required all railway companies to provide separate accommodations for whites and blacks in *intrastate* trains. The law further prohibited the members of either race from riding in coaches assigned to the other. The law specifically provided that the coaches for one race should be the same as for those of the other. It should be noted, too, that white persons were denied the privilege of riding in coaches assigned to blacks, just as colored persons were prohibited from occupying seats in the parts of the train assigned to the whites. *Plessy*, a man of one-eighth negro blood, was forcibly ejected from a coach assigned to white persons and was placed under arrest for violating the law. He contended before the Supreme Court of the United States that the Louisiana statute was unconstitutional as denying to colored persons the equal protection of the law.

<sup>1</sup> *Ex Parte Virginia*, 100 U. S. 339.

<sup>2</sup> 163 U. S. 537.

The decision, however, was against him and the law was held to a valid exercise of the police power. The provision for equal accommodations, as well as the prohibition upon whites as upon blacks against riding in coaches of the other race, made it clear to the court that there was no unfair discrimination.

It must be remembered, of course, that there must be some basis for the classification. The court recognized the desirability in the interest of public welfare to segregate blacks from whites. A law segregating passengers on a whimsical or unreasonable basis would be invalid. A provision, for example, that blonds must be separated from brunettes, or short persons from tall ones, would not only be a denial of equal protection, but would be a deprivation of liberty without due process as well.

The practice, prevalent in many of the states, of classifying as colored persons all those who have any colored blood, is valid. The fact that Plessy had more white blood in his veins than black did not entitle him, under the Louisiana laws, to ride in coaches intended for white persons. The federal courts have been willing to accept such classification of blood as the states have seen fit to establish. This may seem like a discrimination against those of mixed blood, but no law classing as blacks all persons who have any visible admixture of colored blood has been held invalid.

There is nothing in the Constitution to prevent a railroad company, in the absence of federal statute in the case of interstate trains, or in the absence of state laws in the case of intrastate trains, from compelling colored persons to occupy designated sections of a train. The constitutional provisions are, as repeatedly has been pointed out in these pages, directed against governmental action, and not against the actions of private individuals

or corporations. A railroad is a public utility and may not refuse to carry colored persons, but it may, in the absence of statutory regulation, go much farther in race discrimination than may the government.

While it is necessary, in general, to provide equal accommodations for members of all races, a railroad company may refuse to furnish dining and sleeping cars on the grounds that the demand is so small that to run such additional diners and sleepers is taking the property of the railroad without due process. On the other hand, a state law which authorized a railroad company to furnish diners and sleepers for whites without similar accommodations for blacks was held invalid.<sup>1</sup> In other words, a railroad must show that the compulsory operation of separate sleepers and diners for colored people means a taking of property from the railroad without due process and cannot rely on the authority of a law which gives them the right to refuse such accommodations, for such a law may be a violation of the equal protection clause. The right of colored persons to separate accommodations as well as the right of the general public to such separation must be balanced against the right of carriers to make a fair return on the property used in the operation of the railroad. As a matter of fact, colored persons generally refrain from insisting on dining-car and sleeping service, but this is beside the point as far as constitutional law is concerned.

When we study the situation regarding separate public schools for colored children, we find that laws requiring such separation have always been sustained. Any marked discrimination, such as a failure to provide any schools for colored children, would no doubt be invalid. When it comes to the regulation of private schools, the situation is not quite so clear. A law of Kentucky which

<sup>1</sup> McCabe v. Atchison Topeka & Santa Fé Ry., 235 U. S. 151.

prohibits the teaching of both races in a private school was upheld at least as far as Berea College is concerned.<sup>1</sup> The basis for the decision was that Berea College was a corporation organized under the laws of that state and that therefore it had only such powers as the state saw fit to give it. Whether a law prohibiting children of both races being taught in a private school—not a corporation—is constitutional is another question. Perhaps such a law would be upheld on the ground that in the interests of race purity young people of the impressionable age should not be allowed to associate as fellow students in the same school.

Laws which prohibit intermarriage between the races do not deny the equal protection of the law. In Alabama a law punished adultery when committed by persons of different races more severely than when the persons involved were of the same race. This law was held not to be an unreasonable discrimination between races.<sup>2</sup>

Some states have attempted to segregate the races into different sections of a city. The attempt made by the city of Louisville to provide separate districts for white and black was, as pointed out in the preceding chapter, declared null and void by the Supreme Court, but not because of the equal protection clause. The basis was rather the deprivation of property without due process which resulted from the inability, under the ordinance, of a property-owner in certain sections of the city to sell his property to members of certain races. Laws *reasonably* restricting residential areas may possibly be upheld on much the same grounds as are laws segregating passengers on trains and children in schools.

While most of the problems involving race discrimination have arisen in connection with treatment of the

<sup>1</sup> Berea College v. Kentucky, 211 U. S. 45.

<sup>2</sup> Pace v. Alabama, 106 U. S. 583.



negro, there are, nevertheless, a number of constitutional questions which have to do with the treatment of the yellow race and of aliens in general. Discriminations against the yellow race and other aliens in the matter of citizenship and suffrage will be discussed in the next chapter. There have been, however, a number of cases involving civil rather than political rights, where the equal protection clause has been invoked in the interest of these groups.

One of the best known of these cases is that of *Yick Wo v. Hopkins*.<sup>1</sup> A San Francisco ordinance provided that no person should operate a laundry in a wooden building except by permission of the board of supervisors. There were about 320 laundries in the city when the ordinance was passed, and 240 of them were owned and operated by Chinese persons. When the ordinance went into effect every application for a permit from Chinese laundrymen, including that of Yick Wo, was refused, while practically every request from other laundry-owners was granted. Yick Wo had carried on a laundry for twenty years in the very building where he now wished to continue under a license, and when this was refused he went on with his business without a permit. He was arrested and his case finally reached the Supreme Court of the United States, where it was contended in his behalf that the administration of the ordinance obviously denied to Chinese laundrymen the equal protection of the law. The court upheld the contention, pointing out that the action of the supervisors in arbitrarily refusing permits to a certain class meant such unequal treatment as to make such refusal unconstitutional. The fact that the persons discriminated against were aliens did not alter the case in the least, because the equal protection clause

<sup>1</sup> 118 U. S. 356.

applies to all persons under the jurisdiction of the state, regardless of citizenship.

Jury service may be restricted to citizens, and this means that, in nearly all parts of the country, a Mongolian accused of crime is tried by a jury from which members of his race are automatically excluded because of the absence in the community of American citizens of Mongolian ancestry. Such an exclusion does not violate the equal protection clause. No doubt a law excluding from jury service any American citizens of Mongolian blood would be held unconstitutional, for the same reason that the exclusion of negroes in the West Virginia statute was nullified in the case of *Strauder v. West Virginia*.

An Arizona statute, passed in 1914, provided that the working force of every concern employing more than five workers must be made up of at least 80 per cent citizens. This law was held invalid.<sup>1</sup> Such legislation is an arbitrary discrimination against aliens. Furthermore, it is practically an encroachment upon the right of the federal government to control immigration. If the federal authorities see fit to admit a certain number of aliens to our jurisdiction, it would hardly be proper for the states to deny them the right to engage in some honorable means of livelihood. Of a different nature was a New York law which gave preference to citizens for employment in the construction of public works. This, said the Supreme Court, is a case where the state itself is an employer and it is constitutional for the state to rule that only citizens shall be employed by it.<sup>2</sup> This may be good constitutional law, but it would seem that the state might safely set a good example to other employers by using the services of aliens, on the basis that admission by the federal government clearly implies a right to make a living after admission. As the matter now

<sup>1</sup> *Truax v. Raich*, 239 U. S. 33.

<sup>2</sup> *Heim v. McCall*, 239 U. S. 175.

stands, from a legal standpoint, the state may refuse to employ aliens, but it must not pass legislation compelling employers to discriminate against them. What would happen if a state should go in the other direction and compel employers to use a certain proportion of aliens is an interesting question. If a case should arise where the wholesale boycotting of alien labor by employers made it necessary to give aliens employment in order to protect the peace and order of the community, such legislation would no doubt be upheld.

CLASSIFICATION FOR PURPOSES OF TAXATION.—Some of the most important constitutional limitations upon the general taxing power of the state are based on the due process clause. Chapter X is devoted exclusively to an examination of the relation between due process and taxation. Another important limitation upon the taxing power is found in the equal protection clause. This clause means that the state must not, in the exercise of its taxing power, discriminate arbitrarily between different persons or groups of persons. In general, the same rule holds for taxation as for the police power, namely that when classifications are made they must be on the basis of reasonable differences. It may be mentioned, however, that the Supreme Court shows a little more leniency in applying the rule in cases of taxation than in cases involving the police power. This is due to the fact that no organized government can function without the taxing power. Classifications under it may lean more toward the arbitrary than in cases of police regulation. For instance, it would be legal to tax horses at a different rate from sheep, but if a more severe police regulation should apply to one of these than to the others, it could only be on the basis of reasonably greater necessity for regulation in one case than the other. In other words, the distinction need not be so clear cut

for taxation as for the police power. Nevertheless, it must be clearly remembered that tax classification must not be unfairly discriminatory. We shall discuss the relation of taxation to the equal protection clause under five heads—property taxes, excises, inheritance taxes, income taxes, and special assessments.

PROPERTY TAXES.—In classifying real estate it is valid to tax city property at a different rate from farm property. Tangible property may be taxed differently from intangible. Railroad properties may be put in a separate class. A specific tax may be laid on automobiles and not on phonographs, or *vice versa*, but to single out a special make of automobile or style of phonograph by placing a higher tax on it than on other makes or styles would be invalid.

If one piece of property is worth twice as much as another, the more valuable piece may be taxed twice as heavily. But, may the larger piece be taxed not only in proportion to its greater value but also at a higher rate? If one property is worth \$10,000 and another \$20,000, it is perfectly clear that a tax of 2 per cent on each is valid. But suppose that all properties worth over \$10,000 should be taxed at the rate of  $2\frac{1}{2}$  per cent, while smaller properties are taxed at the rate of 2 per cent. Would such a progressive rate be a valid classification? This is a question which is not clearly settled. Many states have provisions in their own constitutions which make progressive taxation impossible. Up to the present time the Supreme Court has not passed squarely on the validity of progressive property taxes, although, as noted below, progressive rates are valid in inheritance and income taxes.

For purposes of administration the state is divided into counties and other subdivisions. Sometimes special taxing districts, such as drainage or park districts, are

established. It may frequently happen that a particular piece of property may be taxed at a higher rate than an adjoining property, which happens to lie just on the other side of the line separating counties or other subdivisions. Such a difference does not constitute a denial of equal protection of the law. This point is taken up in greater detail in the paragraphs below dealing with special assessments.

**EXCISES.**—An excise tax is one levied on the use, manufacture, or sale of any article, or upon the right to engage in a calling or profession or other activity. The state legislature has wide discretion in the levy of excises. It may tax the sale of one commodity and not another. It may discriminate between different professions or occupations, but it may not discriminate unreasonably between persons in the same calling.

A Louisiana statute required the payment of a license fee by all sugar and molasses refiners, but excepted from this requirement all those who were engaged in refining only their own product. This was held to be a reasonable classification and, therefore, not a denial of equal protection of the law.<sup>1</sup> In Montana a state law required a license tax of all males doing hand laundry work. It applied also to women in case more than two women were employed. It was argued that this was an unfair discrimination against hand launderers and in favor of those operated by steam, and, further, that it discriminated against men and in favor of women employees. Here the Supreme Court of the United States was inclined to be lenient and upheld the law as a valid tax legislation.<sup>2</sup> This law seems to be very close to the line. The question of discrimination against Chinese laborers was not raised. It is very likely that if such discrimina-

<sup>1</sup> *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89.

<sup>2</sup> *Quong Wing v. Kirkendall*, 223 U. S. 59.



tion could have been shown the law would have been invalidated.

**INHERITANCE TAXES.**—An inheritance tax is a kind of excise tax. The right to inherit is not a property right, neither is the right to make a will. No one has any constitutional right to inherit property, nor has any property-owner any constitutional right to direct how his property shall descend after his death. If a state interferes with the right to inherit or to devise property it is not taking property without due process. But if, in interfering with inheritances, the state discriminates unfairly between different groups of heirs, it violates the equal protection clause. Thus, if the state should abolish inheritances altogether, such action would probably be valid, but if it should arbitrarily deny certain groups the right to take inheritances and permit it to others it would be class legislation and therefore null and void.

It is the general practice among the several states to levy a graduated inheritance tax, that is, the rate of taxation is increased as the amount of inheritance increases. Besides this, the rate is frequently higher on property passing to distant relatives than to near ones. The leading case is that of *Magoun v. Illinois Trust and Savings Bank*.<sup>1</sup> In this case the court upheld an Illinois statute which taxed small inheritances at a lower rate than large ones, and which taxed property going to near relatives at a lower rate than that going to other parties. There is probably no constitutional limit to the severity of inheritance taxes so long as there is no arbitrary discrimination between those who succeed to property upon the death of the former owner. The exemption of small inheritances from taxation altogether is not a denial of equal protection to those who must pay taxes on larger inheritances.

<sup>1</sup>170 U. S. 283.

**INCOME TAXES.**—The income tax is still another form of excise tax, although usually not spoken of as such. Here, as in the case of inheritance taxes, the rates are usually graduated, although at present only a comparatively few states levy a tax on incomes. A higher rate on large incomes than on small ones is valid, as is also the exemption of certain amounts altogether. In other words, an income-tax law is in complete accord with the equal protection clause, even though it exempts all incomes under a certain amount, with the result that only those receiving larger incomes are compelled to pay an income tax. At the same time any arbitrary classification, such as, for example, the exemption of all professional men from the payment of an income tax, would be a violation of the equal protection clause.

**SPECIAL ASSESSMENTS.**—When public funds are expended for the benefit of a particular locality it is constitutional to compel property-owners in such a locality to bear a larger share of the tax burden than is borne by other taxpayers. Sometimes special districts are established, especially for such purposes as drainage and irrigation, and all property located within such districts is taxed for such improvements, while properties outside are not taxed at all. Unless the boundaries of such districts are obviously discriminatory, the courts are very lenient in accepting the judgment of the legislature in determining the size and shape of such special districts.

In many types of public improvement, however, special assessments are levied on those benefited without any attempt to establish definite district boundaries. Thus, when a street is improved it is proper to assess the cost upon abutting property-owners. Property in the neighborhood, which is benefited, may also be compelled to bear a special assessment even though not actually abutting on the improved street. The question has arisen

whether a special assessment may be levied which amounts to more than the benefits received. In spite of at least one earlier decision to the contrary,<sup>1</sup> the Supreme Court now seems willing to allow special assessments in excess of the actual direct benefits received.<sup>2</sup> However, if a state, or a city acting under the authority of the state, should levy a special assessment which would be obviously out of all proportion to benefits received, such action might be held to be a denial of equal protection.

When special assessments are levied, it does not follow that all properties benefited need pay a special assessment as long as the classification is not arbitrary. A property-owner on an improved street, who is compelled to pay a special assessment, cannot refuse to pay on the ground that property on an intersecting street, which also derives benefits from the improvement, is not taxed for that purpose. On the other hand, the arbitrary exemption of certain properties on an improved street from special assessment would clearly be in violation of the equal protection clause. A property-owner on an improved street cannot argue that the nature of his property is such that the particular improvement does not benefit him. There are people who severely object to improving a street because of the added traffic which may be attracted to it and who feel that the quiet of a poorly paved street is worth more than a noisy thoroughfare with a smooth roadway. Such an argument would not hold in court, and such persons who own property in the benefited locality are held for special assessment in spite of their belief that the property is harmed rather than benefited.

The important question in all matters pertaining to

<sup>1</sup> *Norwood v. Baker*, 172 U. S. 269.

<sup>2</sup> *French v. Barber Asphalt Paving Co.*, 181 U. S. 324.

the equal protection clause is reasonableness of classification. Whenever the state in the exercise of any of its powers interferes more with the civil rights of some persons or groups of persons than with others, the question of equal protection arises. The whole matter simmers down to an application of good hard common sense in determining whether or not there is a reasonable basis for whatever discrimination the state may attempt to impose upon a portion of those under its jurisdiction. Here, as under the due process clause, the courts come very close to deciding as to the wisdom of legislation. It is a well-established principle in American jurisprudence that courts are to decide on the constitutionality, rather than the wisdom, of the statutes, but when the due process and equal protection clauses are involved constitutionality very frequently depends in part, at least, upon the wisdom of the questioned legislation.

## CHAPTER XIII

### CITIZENSHIP AND SUFFRAGE

UNITED STATES CITIZENSHIP AND STATE CITIZENSHIP. —State citizenship is of comparatively little importance to the average American. The question of whether a person is a citizen of Ohio, for example, amounts, in most cases, to a question of whether he is a legal *resident* of Ohio. Hence, it is legal residence in a state rather than "citizenship" in it which is significant. For practically all purposes, it might be said that a person who is a citizen of the United States, and who resides in Ohio, is by virtue of that residence also a citizen of Ohio. The matter of federal citizenship, therefore, is of paramount importance. Upon it depends not only the state citizenship of the individual, but his standing in the field of international relations as well. Later in this chapter we shall discuss privileges and immunities of citizens of the United States. There the reader will note that there seem to be some important distinctions between federal and state citizenship. Because of the turn which the decisions on this point have taken, the distinction is, however, of comparatively little importance to the average citizen. This matter will be elaborated under its proper heading.

By the provisions of the Fourteenth Amendment "all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state in which they reside." While this clause specifically refers to state citizenship, its chief effect, as far as this point is concerned, is to make it im-



possible for any state to treat as an alien any person who has federal citizenship. Its main object, of course, was to prevent any state from treating the newly emancipated slaves as though they were not citizens. At other points in the Constitution there are also references to state citizenship. The judiciary article speaks of cases "between a state and citizens of another state," "between citizens of different states," etc. Again, in Article IV it is stated that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." In both these instances it would make practically no difference, so far as the actual operation of the Constitution is concerned, if, instead of the words *citizens of a state* the phrase, *citizens of the United States residing in a state*, had been used.

This whole discussion would have had to take a different turn if it had been written before the adoption of the Fourteenth Amendment, because, prior to that time, it seems that only such native-born persons as were accorded local citizenship by the state in which they resided were recognized by the United States as having national citizenship. Of course, even then it was possible for Congress to admit by naturalization such foreigners as it saw fit, regardless of the attitude of any particular state toward such action. The Fourteenth Amendment, however, makes everyone born or naturalized in the United States a citizen. Furthermore, Congress is given complete control over naturalization by specific constitutional grant.

In short, then, the matter of citizenship is out of the hands of the several states. No state may treat any native-born or naturalized citizen as though he were an alien. If his citizenship is recognized by the federal government, the matter is settled. But may the state, on the other hand, grant privileges which are incident to

citizenship, such as the right to vote or to own property, to persons who are not citizens of the United States? As far as suffrage is concerned, some states have given the right to vote to aliens who have taken out their first papers—that is, to those who have declared their intentions to become American citizens. Such action is clearly within the power of the states. No doubt each state also has the power, if it so wishes, to extend privileges usually granted to American citizens, to other persons. It may even extend certain rights, such as to own or to inherit property, to foreigners who are not even residents in the state. Such privileges, however, do not give the status of citizenship to the persons enjoying them. Such privileges, while incident to citizenship, may be enjoyed also by aliens. In a figurative sense it might be said that persons, who are not American citizens, but who are given certain civil or political rights by a state, are “citizens of the state.” But whether they are called “citizens” or are labeled “non-citizens with certain privileges” is really immaterial. The real question of political allegiance is settled by federal citizenship. In the international field it is federal citizenship only which governs in determining the nationality of the individual.

It is possible, of course, to have federal citizenship without in any sense being a citizen of any state. American citizens residing in the incorporated territories or in the District of Columbia have no relationship to any of the states. The same is true of American citizens whose legal residence is on foreign soil. In the latter group are those who are American citizens even though born abroad, because of the American citizenship of the father, and who, remaining abroad, have not established a residence in any of the states.

By the provisions of the Fourteenth Amendment there are two ways in which one becomes an American citizen.

One is through birth in the United States or in territory subject to its jurisdiction. The other is by naturalization, which process, as already noted, is entirely in the hands of the federal government. We have, then, two types of citizens, the native born and the naturalized. As far as constitutional law is concerned, there is only one distinction between the two, and that is in the matter of eligibility to the Presidency and Vice-Presidency of the United States. By constitutional provision only native-born citizens may be President or Vice-President. In all other respects the constitutional status of each class of citizens is identical. There is, however, one distinction between the two which is of importance only in case a naturalized citizen goes abroad. This distinction, which is based on international law and practice and not on American constitutional law, is, in essence, that a naturalized citizenship may be canceled if the person involved returns to and remains for a period of two years or more in his native land, or for a period of five years or more in any other foreign land. Citizenship by birth, of course, cannot be lost except through formal naturalization in a foreign country.

**CITIZENSHIP BY BIRTH.**—Any person born in the United States and subject to its jurisdiction is by virtue of such a birth an American citizen. While the immediate purpose of the provisions of the Fourteenth Amendment was to insure citizenship to the freed slaves and their posterity, it has been held by the Supreme Court that it applies to all children born in the United States and under its jurisdiction, irrespective of the nationality of the parents. Even when the parents are not eligible to naturalized citizenship, native-born citizenship is attained by American birth. This question was raised in an interesting case which was decided by the Supreme

Court in 1898.<sup>1</sup> A young man named Wong Kim Ark was born in 1873 in California of Chinese parents. Except for two visits in China he continued to reside in the United States. In 1895, when returning from a trip to China, he was refused admission on the ground that he was not a citizen. On a previous occasion he had been allowed to enter as a native-born citizen. The immigration authorities maintained that he should not be recognized as a citizen because his parents were, under the naturalization laws, ineligible for American citizenship. His parents were not here as diplomatic or official representatives of the Chinese government and hence were clearly under American jurisdiction at the time when the child was born. The court adopted the only logical interpretation of the words of the amendment and held that "citizenship by birth is established by the mere fact of birth under the circumstances defined in the Constitution," and allowed the young Chinaman to enter.

It should be noted that the Constitution provides that to acquire citizenship by birth a person must be born in the United States *and subject to the jurisdiction thereof*. Under certain circumstances a person may be born within the territorial limits of the United States but not subject to its jurisdiction. Perhaps the best illustration of such circumstances is found in the case of children born to foreign diplomats while in the United States. Diplomatic representatives of other countries are, in international law and practice, looked upon as being outside of the jurisdiction of the United States, and their offspring do not become citizens by virtue of birth within the territorial limits of the United States. Because of this distinction the child of the Chinese minister, for example, may not become an American citizen by virtue of his American birth, while a child born in this country of a

<sup>1</sup> United States v. Wong Kim Ark, 169 U. S. 649.

Chinese family not connected with the diplomatic service is a full-fledged native-born citizen of the United States. Children born on board foreign warships while in American harbors are held to be born outside of the jurisdiction of the United States, in spite of the fact that such warships may actually be in American territorial waters.

Previous to 1924 members of Indian tribes were not considered citizens. Congress had at various times provided by special Acts for the naturalization of certain individuals not living in tribal relations, but by a decision of the Supreme Court in 1884 the children of Indians living in tribes, even though residing within the limits of the United States, were not citizens under the Fourteenth Amendment.<sup>1</sup> In 1924 Congress passed a law which granted American citizenship to all Indians born within the territorial limits of the United States. There is no question about the constitutional right of Congress to do this under its power over naturalization. An interesting question is whether the citizenship conferred upon the American Indian is native born or naturalized. The only way in which this question can come before the Supreme Court is in case a person born in an Indian tribe should become President or Vice-President of the United States. If the court would stick to the view taken in the case just referred to, such a person might be held to be a citizen by virtue of the exercise by Congress of its powers over naturalization, and would, therefore, be ineligible because of the constitutional requirement that no one except native-born citizens shall become President or Vice-President.

Congress has conferred American citizenship upon all Hawaiian citizens. Porto Ricans, also, have by law of Congress been granted full citizenship. Alaska is clearly an incorporated territory and all persons born within its

<sup>1</sup> *Elk v. Wilkins*, 112 U. S. 94.



boundaries are citizens of the United States. The inhabitants of the Philippines are not citizens; neither are they aliens. In International law they might be referred to as *subjects* of the United States, but, because this term does not meet favor with American public opinion, the word *nationals* is used to designate the status of those who are neither citizens nor aliens. This is the name now applied not only to the Filipinos, but also to the inhabitants of other American dependencies such as Samoa and Guam. In other words, the term United States as used in the United States Constitution does not necessarily include all of our outlying dependencies.

As stated above, children born in the United States, of foreign parents not connected with the diplomatic service of their native countries, may, by virtue of such birth, enjoy native-born American citizenship. It must be remembered, however, that under the generally accepted rules of international law such persons may, if they choose, by complying with certain conditions, keep the citizenship of their parents instead of accepting American citizenship. It is their constitutional right, however, under the Fourteenth Amendment, to be considered as native-born American citizens, but they are not compelled to be so considered.

The rule works the same way in the opposite direction. Children born abroad of American parents (not in the diplomatic service) are allowed by many countries to grow up as citizens of the country in which they were born if they so desire. At the same time the United States government will recognize such persons as citizens if they fulfill certain conditions. No persons born abroad of American parents are allowed to take advantage of this provision in case the father has never been a resident of the United States. In such a case there is, of course, the opportunity afforded by naturalization. Children

born abroad in the family of a diplomatic representative are looked upon in international law as being born in the United States and subject to its jurisdiction.

**CITIZENSHIP BY NATURALIZATION.**—By naturalization we mean the process outlined by law by which an alien becomes a citizen. As has been stated already, Congress is by express grant given complete authority over the process. It is within the powers of Congress to naturalize such aliens as it may see fit to citizenship, or to naturalize none if it so desires. Out of respect to the governments of other countries and in a desire to aid the movement toward a certain amount of uniformity in the matters of naturalization, Congress has enacted legislation which resembles rather closely that of other countries. In order to avoid international complications it is often desirable to avoid discrimination as between the aliens of different countries. Congress has the right, however, to make discriminations if it wishes. At present only members of the black and white races are naturalized. The admission of aliens into the United States is, of course, a different question from naturalization. The federal government has full power over immigration, but this will be discussed in a later chapter (see Chapter XIV).

Naturalization may be of two kinds, individual or collective, the latter being used only when a territory is annexed in which case all residents are usually given citizenship by blanket legislation. This topic will be elaborated in a later paragraph. In accordance with the practice of many of the leading countries, at least five years' residence is required before naturalization of an individual may be consummated. The details of the process are outlined by law. In brief, the applicant, after establishing residence in the United States, must declare his intentions of becoming an American citizen,

at the same time renouncing his allegiance to the country of which he has up to that time been a citizen. This is popularly called taking out his "first papers," and the applicant must be at least eighteen years of age when this is done. Not more than seven, or less than two, years after taking out the first papers he must file a petition before the proper court asking to be made a citizen, provided, however, that at least five years must elapse between the time he establishes his residence and the filing of the petition. Ninety days after the petition is filed the applicant is given a hearing, which may be searching or not, as the court sees fit. After the hearing the certificate of naturalization may be granted. A shorter process of naturalization is provided in the case of persons who have served in the armed forces of the United States and in the case of persons who have served as seamen on American ships.

The naturalization of a parent automatically naturalizes the minor children if they are at the time of naturalization residents of the United States. Previous to 1922 the naturalization of the husband automatically made the wife a naturalized citizen. In that year Congress, in recognition of the growing demands for greater independence of women in the choice of citizenship, enacted a law which not only makes separate naturalization necessary, but which also changes materially the old rule that the husband and wife always be considered as having the same citizenship. The matter of the citizenship of married women will be discussed further in a later paragraph.

WHO MAY BE NATURALIZED?—As already indicated, it is entirely within the power of Congress to decide what persons shall be naturalized and what persons, races, or nationalities shall be excluded. As the law now stands only members of the white and black races may take out

citizenship papers. The purpose of this, of course, is to exclude the Asiatics. American Indians, now recognized as citizens by virtue of American birth, were, previous to 1924, admitted by special Act in cases of such Indians as had severed tribal connections. It is not entirely clear whether Filipinos may be naturalized, even though the applicant may be of the yellow race. Filipinos are not aliens and it has been held by a lower federal court in at least one case that the limitations of the right of naturalization to white and blacks applies only to aliens, and that therefore Filipinos who establish a residence in the United States are eligible to naturalization regardless of color or race. The lower federal courts have in other cases held that only white and black Filipinos may receive certificates of naturalization. As the matter has never been brought before the Supreme Court and as Congress has made no further changes in the law, the final word has not been said. Some of the careful students of the Constitution are of the opinion that the first of the above cases gives the better interpretation of the law, and that, therefore, "nationals" may be admitted even though of yellow or brown blood. It should be clearly borne in mind that the question of who may be naturalized is not a constitutional one, but depends on the action of Congress. This action is effected, naturally, by the desire on the part of Congress to show a certain degree of respect for the feelings as well as for the practices of other nations.

May Congress under its power over naturalization, instead of refusing absolutely to naturalize an alien or a certain class of aliens, admit them to citizenship on certain condition? It is a common rule of constitutional interpretation that whatever may be prohibited may be permitted on hard terms. Would it be constitutional for Congress to allow Japanese, for example, to become

naturalized on condition that they should not own land? In all probability such a procedure would be held to be in violation of the due process clause of the Fifth Amendment. It would also very likely be subversive to the public interest to create different classes of citizenship. To say that no Japanese shall be naturalized is within the power of Congress, even though members of all other nations be admitted; but to admit Japanese to naturalization on a different basis than other persons would probably be invalid, as well as unwise.

**EXPATRIATION.**—Expatriation is the act of changing citizenship viewed from the side of the country to which allegiance is renounced. Only comparatively few Americans renounce their allegiance to the United States and take up foreign citizenship. Because the stream of migration is in the other direction, and, perhaps due to provincialism, we are inclined to be impatient with a person who expatriates himself. Expatriation is not dishonorable. All naturalized persons, including some very desirable citizens, are expatriates from their respective countries of origin. For a period in our history we failed to recognize legally the expatriation of an American citizen, and, by implication at least, supported the proposition that a person once an American is always an American, as far as the statutes were concerned. This, too, in spite of our insistence that foreigners who had become naturalized in the United States should be recognized by the country of their origin as American citizens. In 1907 Congress formally provided for the recognition of expatriation. Under the provisions of an Act passed in that year, the foreign citizenship of an American who is naturalized by another country is officially recognized. It is also provided that a naturalized citizen shall be presumed to have lost his American citizenship if he remains two years or more in the coun-



try of his origin, or five years or more in any other foreign country. Such presumption may be overcome by presenting evidence to the proper diplomatic or consular authorities that he desires to continue his American citizenship. There is one circumstance under which the right of expatriation is not recognized and that is when we are at war. The matter of expatriation, like naturalization, is in the hands of Congress. Congress, however, cannot take away the citizenship of any person or group of persons, except possibly as a punishment for crime. Compulsory expatriation under any other circumstances would be a violation of the due process clause. An exception to this seems to be the expatriation of women through marriage with an alien previous to 1922.

**CITIZENSHIP OF MARRIED WOMEN.**—To single women the same rules for citizenship and naturalization as to men have long applied. Up to 1922, however, the practice in international relations—a practice which was sanctioned by law in many countries, including the United States—was that the citizenship of the husband determined the citizenship of the wife. This is still the rule the law of most countries, and the marriage of a woman citizen in any of these countries to an alien makes her also an alien.

By the law passed in 1922, a woman retains her American citizenship, even though she marries an alien, unless she formally renounces it. If she has lost her citizenship by virtue of her marriage with an alien before the passage of the law, she may get it back by naturalization, regardless of whether her husband becomes naturalized. Any American woman, however, who becomes the wife of an alien who himself cannot be naturalized loses her American citizenship as long as she remains the wife of the ineligible alien. By the application of the same principle, a woman foreigner no longer secures Ameri-

can citizenship merely because she marries an American citizen. She still remains an alien. The process under which such a woman may be naturalized is, however, comparatively simple. It is also possible now for the alien wife of an alien husband to become naturalized even though the husband is not. In other words, there is a general recognition of the new, but now widely accepted, principle that a wife should have as much right to decide her own personal citizenship as should a husband. The citizenship of children, however, is still determined by the status of the father. The regulations concerning the citizenship of married women, like all matter pertaining to naturalization, is a statutory, and not a constitutional, matter.

COLLECTIVE NATURALIZATION.—Collective naturalization takes place when a group is given American citizenship *en masse* without considering particularly the fitness of the individuals of the group. This procedure is commonly followed when territory is annexed to the United States. Thus, in 1917, American citizenship was granted collectively to the Porto Ricans. This is usually done by an Act of Congress, but it may also be brought about by virtue of the treaty under which the territory involved becomes subject to American jurisdiction. Invariably there is opportunity given to individuals in the group to indicate by some formal action that they prefer to retain their former citizenship, in which case the collective naturalization does not include them. The usual method followed is to provide by law or treaty that all residents of the territory will, upon a certain date, automatically become American citizens unless they formally ask to keep their present citizenship. In individual naturalization the individual must take the initiative if he wishes to become a citizen. In collective naturaliza-

tion the individual must take the initiative if he prefers *not* to take on American citizenship.

PRIVILEGES AND IMMUNITIES OF CITIZENS OF THE UNITED STATES.—One of the provisions of the Fourteenth Amendment, which would have changed materially our whole federal theory of government, if it had been interpreted according to the minority of the Supreme Court in the famous Slaughter House Cases,<sup>1</sup> is the statement that “no state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States.”

The state of Louisiana had by law granted to a certain corporation the monopoly, within the city limits of New Orleans, to slaughter animals for food. The corporation was required to permit the use of their plant by other persons for a certain charge. This law was attacked by the butchers of the city as being unconstitutional on various grounds. One of these grounds was that such a law abridged “the privileges and immunities of citizens of the United States.” It was contended vigorously that the Fourteenth Amendment, by these words, prohibited the several states from interfering in any way with the rights and privileges which citizens enjoyed in the states in which they resided, either by virtue of the common law or by virtue of the statutes or constitutions of the respective states. Such an interpretation would have imposed such severe restrictions on the states, and would have placed in the hands of the federal government such sweeping powers that the several states would have been little more than administrative units under a highly centralized government, and would have been entirely contrary to the federal theory upon which the Constitution had, prior to that time, always been interpreted. In other words, it was contended that the

<sup>1</sup> 16 Wallace 36.

privileges and immunities of *citizens of the United States* included all possible rights and privileges, civil and political, which accrue to those who are of American citizenship, regardless of whether these rights and privileges relate themselves to state or federal matters.

The Supreme Court by a vote of five to four refused to grant these contentions, and, in effect, held that this clause was simply declaratory of a condition that already existed—namely, that no state could interfere with the rights of citizens which related directly to the federal government. Some of the rights which the states cannot interfere with are—to use the words of the court in the Slaughter House Cases—“to demand the protection of the federal government . . . when on the high sea or within the jurisdiction of a foreign government . . . to use the navigable waters of the United States, however they may penetrate the territory of the several states,” and to enjoy “all rights secured to our citizens by treaties with foreign nations.”

This, of course, is not a complete list of what is included under “privileges and immunities of citizens of the United States.” In other cases other rights have been added, such as the right of going to the seat of the federal government, access to its seaports and its offices in various parts of the country, and to its courts; protection against violence while in custody of United States officials; the right to make a homestead entry on public lands; the right of candidacy, if qualified, for the Presidency, or a United States Senatorship, or for membership in the House of Representatives. None of these rights, or similar ones, which may be held to be privileges accruing from direct relationship with the machinery of the federal government, may the states abridge. The right to vote is not included in the list, except that all persons who may vote for the numerous branches of the state

legislature may, by the specific provision in Article I, Section 2 and by the Seventeenth Amendment, vote for members of both Houses of Congress.

Privileges and immunities of United States citizenship do not include the guarantees of the first eight amendments. These guarantees are directed only against the federal government and the provisions of the Fourteenth Amendment do not affect their status.

In the opening paragraph of this chapter it was pointed out that the distinction between federal and state citizenship is of little importance to the average American. This is true in spite of the fact that the decision in the Slaughter House Cases involves considerable discussion of state citizenship. What it amounts to is that the clause relating to privileges and immunities of the United State citizenship relates only to those rights which are enjoyed because of direct and intimate relationship between the citizen and the federal government, and does not relate to the great mass of rights based on the common law or on the state constitutions and statutes. The states are, of course, limited by the due process and the equal protection clauses of the Fourteenth Amendment, but that is a different matter.

The Fourteenth Amendment is directed against state action and *not* against any interference by *individuals*. If the action of private individuals interferes with the privileges and immunities of the United States citizens, or deprives said persons of life, liberty, or property without due process, or denies any person the equal protection of the law, such interference is not in violation of the Fourteenth Amendment. Of course, if the interference is suffered because of action by state or municipal officers, it is held to be state action and is a violation.

On the basis of this reasoning, it has been held that the federal government has no right to punish *individuals*



whose actions are such that, if performed by state agencies, they would be unconstitutional. This was made clear in the Civil-Rights Cases.<sup>1</sup> Congress in 1875 passed a law making it a misdemeanor for owners of hotels, places of amusement, and public conveyances to discriminate against persons on account of color. This act was declared invalid. Congress may, however, prevent state officials from carrying out laws which are in violation of the guarantees of the Fourteenth Amendment. Such state laws, of course, are also subject to possible nullification if brought before the courts.

**SUFFRAGE.**—The determination of who shall vote in the United States is left entirely to the several states. This is not strange so far as state and local elections are concerned, as it is obvious that under a federal government each state may properly determine who shall enjoy the privileges of suffrage in matters relating to its own internal affairs. But to turn over to each of the states the power to decide who shall vote in that state in national elections, as is the case under our Constitution, is a different matter. We have grown up under this system and do not give it much thought, but, to a foreigner studying our electoral system, this must seem strange indeed. If one wishes to determine who may vote in the presidential or congressional elections, he must, if he is to use official information, go to forty-eight different sources—that is, he must examine the constitution and the election laws of each one of the several states. Most of these may have a list of suffrage qualifications very similar to those of other states, but this is due to the fact that each state has consciously endeavored to keep in line with the others on this point.

How does it come about that each state has the power to decide who may vote in federal elections? It is due

<sup>1</sup> 109 U. S. 3.

to two specific provisions in the Constitution—one relating to congressional elections and the other to presidential elections. In Article I, Section 2 it is provided that all persons who are permitted to vote for members of the most numerous house of the state legislature are to vote for members of the House of Representatives. When, by the Seventeenth Amendment, United States Senators were also made popularly elective, this same provision as to suffrage qualifications was included. If we want to know, then, who may vote for members of the United States Senate or House of Representatives in New York, for example, what we must do is to examine the constitution and the statutes of that state to see who may vote for members of the state Assembly, as the most numerous branch of its state legislature is called. If New York sees fit to require an educational qualification for voting for members of its lower house, while Pennsylvania has no such requirement, it means that a person without such qualifications living in Pennsylvania may vote in the congressional election, while persons of like status living in New York would be excluded. No state, of course, may deny the right to vote in congressional elections to any person qualified to vote for the most numerous branch of the state legislature. To all persons who meet the state requirement, the right to vote in congressional elections is guaranteed by the provisions referred to above. Hence, it is true to say that the right to vote for members of Congress has its foundation in the federal constitution. It is the details as to suffrage qualifications which are determined by the several states.

While the actual suffrage qualifications are based entirely on the state constitutions and statutes, it is, however, within the power of Congress to regulate, concurrently with the states, the time, place, and manner of holding congressional elections. Section 4 of Article I

gives this power also to the several states, but provides that Congress may alter such regulations. Under this power, Congress has regulated campaign expenditures and enacted Corrupt Practices Acts in connection with the election of Senators and Representatives. The question arose in the famous Newberry case<sup>1</sup> as to whether Congress, under this provision, has a right to regulate the primary elections at which a United States Senator is nominated. In spite of the obvious fact that a primary is a very important step in the process of selecting an official, the Supreme Court held that the federal Corrupt Practices Act was unconstitutional as far as it extended to the *nomination* of a United States Senator. As the matter now stands, the federal government may enact and enforce legislation to protect the final election, but the supervision and control of the nominating machinery is entirely in the hands of the state.

When we examine the constitutional provisions for presidential elections, we discover that here too the details are turned over to the states. In fact, the power of the several states over the presidential suffrage is even greater than in the case of congressional suffrage. The Constitution provides that the President and Vice-President shall be elected by presidential electors. Each state is to choose as many electors as it has Representatives and Senators. But how are these electors to be chosen? Here the Constitution turns the details over to the several states by saying that the presidential electors shall be selected in each state "in such manner as the legislature thereof may direct."<sup>2</sup> The state legislature is given full and complete power. It may, if it so desires, provide that the presidential electors from the state shall be chosen by the legislature itself, and in this

<sup>1</sup> Newberry v. U. S., 256 U. S. 232.

<sup>2</sup> Article II, Section 1.

way abolish the popular election of the electors as far as that State is concerned. This indeed would be only a return to the early practice. Washington was elected President by an electoral college selected by the several state legislatures.

As a part of the movement toward democracy, however, the legislatures of the several states have provided that the presidential electors shall be chosen by popular vote. But it should be remembered that no citizen has any right, under the Constitution, to vote in the presidential elections. It is within the power of the legislature to make whatever regulations, regarding the selection of electors, which it sees fit. As already pointed out, it has the power, if it so desires, to return to the early method of direct appointment by the legislature. It may, by law, vest the selection of the electors in any person or group of persons in or out of official life. It would be constitutional for the state legislature to prescribe suffrage qualifications for voting for presidential electors of a very different nature from those required in voting for other officials.

Before the adoption of the woman suffrage amendment, there were certain state legislatures with a majority of the membership favoring votes for women, but where the amending process of the state constitution was so slow or difficult that it was impossible to grant complete woman suffrage. In a few such cases—Illinois was one of them—the state legislature took advantage of its powers over presidential elections and gave the presidential suffrage to women. In at least one presidential election, the women of Illinois were permitted to vote for presidential electors, but not for members of Congress nor for state officials.

It is conceivable that a situation may arise where it may be desirable to require educational tests for voting, but

where it may be very difficult to add such a provision to the state constitution which invariably prescribes the suffrage qualifications which are in force in the state. Under such circumstances the legislature might without any change in the state constitution add an educational requirement for the presidential suffrage. The legislature may, of course, also make changes in the opposite direction. With a state constitution requiring certain educational standards of voters the legislature may give the presidential suffrage to persons who do not meet the requirements.

It is also within the power of the legislature to provide for the election of presidential electors by districts instead of by the state at large. The present plan in all states, however, is to elect them as a group from the entire state, and no attempt is made to apportion the electors to congressional districts as was once the practice in the states.

The whole matter of suffrage qualifications, then, with the exception of the limitations in the Fourteenth, Fifteenth, and Nineteenth Amendments, which will be discussed presently, is left to the several states. Congressional suffrage is left to the state—which usually means that it is defined in the state constitution. Presidential suffrage, on the other hand, is not left to the *state*, but to the *state legislature*, which means that a statute is sufficient to define it even though such statute prescribes different qualifications for presidential, than for other suffrage.

Congress is given certain limited powers over the choosing of electors, in that the Constitution gives to it the right to determine the time for the choice of electors. The day upon which the electors, in turn, cast their ballots is also determined by Congress. The Constitution specifically states, further, that this day must be the



same throughout the United States. The first Tuesday after the first Monday in November is the time at which electors are chosen. Congress has designated the second Monday in January following their selection as the date upon which the presidential electors shall assemble in their respective states—usually in the state capital—and cast their ballots for President and Vice-President. Presidential electors have been held by the Supreme Court to be state, and not federal, officials.

**LIMITATIONS UPON THE POWER OF THE STATE OVER SUFFRAGE.**—A discussion of the sweeping powers which the several states enjoy over federal suffrage would be incomplete without an examination of three different provisions in the federal Constitution which limit the power to prescribe suffrage qualifications. These limitations relate to the right to vote for state and local officials as well as to federal suffrage. These three limitations are, first, those found in the second section of the Fourteenth Amendment; second, the Fifteenth Amendment; and, third, the Nineteenth Amendment.

**SUFFRAGE PROVISIONS OF THE FOURTEENTH AMENDMENT.**—Of the three limitations listed above, the least important is that found in the second section of the Fourteenth Amendment. It might be added that the particular portion dealing with suffrage is perhaps the least vital of any of the provisions of the entire amendment. It is, for reasons which appear presently, virtually a dead letter, and is, therefore, in striking contrast to other portions of the amendment which are full of vitality.

On the matter of suffrage, the Fourteenth Amendment provides that any state which denies any portion of the male inhabitants over twenty-one years of age the right to vote in any state or national election shall be punished by having its representation in the House of Rep-

representatives cut down in the same proportion. That is, if Mississippi, for example, should, in an endeavor to keep the negro from voting, provide such high educational or property qualifications for voting that one-fourth of the male inhabitants of the state over twenty-one were disfranchised, it would be liable to lose one-fourth of its representation in Congress and the number of Congressmen from Mississippi would be reduced from eight—the present number—to six. The weakness of this provision is that its enforcement depends entirely upon the willingness of Congress to cut down the representation of the offending state. This, no Congress has been interested in doing, and, as no other agency has the power to change the representation of any state in the House, the whole provision is virtually a dead letter.

**THE FIFTEENTH AMENDMENT.**—Less than two years after the adoption of the Fourteenth Amendment the Fifteenth became a part of the Constitution. It provided that neither the United States nor any state shall deny or abridge the right of any citizen to vote because of race, color, or previous condition of servitude. All negroes had been made citizens by the Fourteenth Amendment. It is frequently stated that the Fifteenth Amendment guarantees the negro the right to suffrage. This is a misleading statement. The negro is not guaranteed this right any more than is the white, but he is protected against discrimination because of his race, color, or previous condition of servitude. If a state, by imposing property qualifications for voting, keeps more blacks than whites away from the ballot box, it does not thereby violate this amendment.<sup>1</sup> Such a law would, to be sure, violate the second section of the Fourteenth Amendment, but this, as already explained, is virtually a dead letter.

<sup>1</sup> *Williams v. Mississippi*, 170 U. S. 214.

It is only when the lines are drawn on the basis of race, color, or previous condition of servitude that the Fifteenth Amendment is violated.

A most interesting question regarding the interpretation of the Fifteenth Amendment arose in connection with the so-called "grandfather clause," which appeared in the constitutions and statutes of some of the states having a large negro population. The general purpose of the "grandfather clause" was to deny or abridge the right, first, of those persons to vote who themselves had not been entitled to vote previous to 1866 (the Thirteenth Amendment, freeing the slaves, went into effect late in 1865), and, second, of those who were not lineal descendants of persons who had been entitled to vote previous to that year. There was no mention of race, color, or previous condition of servitude, but it was obviously intended to disfranchise those who, because of a previous condition of servitude of themselves or their ancestors, were unable to vote before the abolition of slavery.

It was not until 1915, fifty years after the close of the Civil War, that the Supreme Court passed definitely on the constitutionality of the "grandfather clause." The case which was brought before it arose in Oklahoma, where a literacy test was required of all voters except those who had been entitled to vote previous to January 1, 1866, and the lineal descendants of such persons. This meant, in effect, that, without any direct mention of race or color or previous condition of servitude, the negro was compelled to meet a literacy test not required of other citizens. The Supreme Court held this to be a violation of the Fifteenth Amendment, in that it discriminated against certain citizens on the basis of previous condition of servitude.<sup>1</sup>

<sup>1</sup> *Guinn v. U. S.*, 238 U. S. 347.

The Fifteenth Amendment is not directed against the acts of private individuals. If any person, or group of persons, not acting for the state in an official capacity attempts to keep negroes from voting by intimidation or by any other means, such action is not a violation of the Fifteenth Amendment. It is only in case the *state* denies or abridges the right to vote on the bases mentioned, that the federal government has any right to control action on the basis of the Fifteenth Amendment.

THE NINETEENTH AMENDMENT.—The Nineteenth Amendment follows word for word the phraseology of the Fifteenth, except that the word “sex” replaces the words, “race, color, and previous condition of servitude.” Because its purpose is to place women on the same basis as men as far as the suffrage is concerned, this amendment may be properly referred to as the woman-suffrage amendment. Speaking more accurately, however, it should be called the equal-suffrage amendment. Any discrimination against male citizens in regard to voting would be just as much a violation as a discrimination against women.

Because the wording follows so closely that of the Fifteenth Amendment the same general principles apply to it. Any suffrage regulation not based on sex is not a violation, even though it may incidentally keep more women than men (or *vice versa*) from voting. The Nineteenth Amendment, like the Fifteenth, is directed only against governmental action, and any conduct of private individuals which may violate the general spirit of either or both of them is not a violation of these amendments. Such conduct, of course, can be made punishable by state law. Congress may, of course, regulate congressional elections under powers given it in the original Constitution.

## CHAPTER XIV

### FOREIGN RELATIONS AND THE CONSTITUTION

**C**ONTROL OF FOREIGN AFFAIRS.—The very nature of the problems which arise in connection with foreign affairs makes it imperative that they be administered by a central agency. Even under the Articles of Confederation, where the centralization of power was kept at a minimum, the federal authorities were given more control over foreign affairs than over any other governmental activity. Obviously, it would be highly inadvisable, if not impossible, to distribute the power over foreign relations among the several states. Such distribution would be contrary to the fundamental principles of a united country. If there is any one place where centralization is necessary it is in the field of foreign affairs. A united front must be presented to the outside world.

The Constitution of the United States very wisely places in the federal government complete control over foreign affairs. This is accomplished by directly granting to the federal authorities such powers as treaty-making, carrying on war, recognition of foreign states, regulation of foreign commerce, and so forth. Furthermore, the several states are absolutely prohibited from making treaties with foreign countries (or with one another). With the consent of Congress a state may make an agreement, or compact, with a foreign country (or with another state). Such agreements do not have the standing of treaties and are of little political importance, and even here the state is powerless unless Congress approves its action.



Because of this situation a foreign country which wishes to negotiate with the state of Ohio, for example, must do so through the United States. Let us suppose that in an Ohio riot citizens of Rumania are killed and injured, and that the Ohio authorities are negligent in prosecuting the offenders. Let us suppose also that there is no treaty between the United States and Rumania covering such a situation. Under our system of dividing power between the federal government and the several states, the national authorities have no right or power to prosecute rioters and murderers. These acts are entirely within the residual and inherent powers exercised by each state. So that, if the government of Rumania should ask the federal government to prosecute the offenders against Rumanian citizens, the reply of our government would be that the prosecution under our dual form of government is entirely in the hands of the state of Ohio. Rumania's next move might be to attempt direct conversations with Ohio in an endeavor to stimulate its government to take the desired steps. In that case Rumania would be politely but frankly advised by the federal government that all international matters must be carried on through the federal authorities at Washington. In short, Rumania would discover that she could not deal with Ohio directly and that, furthermore, the United States government itself does not have the authority, in the absence of a treaty, to compel the prosecution of offenders against the life, liberty, and property of aliens. This peculiar situation—and to foreigners a most puzzling one—is due to the fact that our central government has, as was pointed out in Chapter IV, only delegated and enumerated powers. If however, there is a treaty between the United States and Rumania in which the United States agrees to prosecute offenders against Rumanian citizens in this country, the situation

is quite different. In such case the federal government has the right to take steps to carry out the provisions of the treaty.

**CONFLICT BETWEEN TREATY-MAKING POWERS AND THE INHERENT RIGHTS OF STATES.**—The federal government has no right to dictate to a state as to prosecutions for murder committed in that state. But if the murdered person is the citizen of a foreign country with which the United States has a treaty in which the United States agrees to prosecute those who infringe on the rights of the citizens of such country, the federal government then may, on the basis of such treaty obligations, take the proper steps to see that the prosecution is effectively carried on. In other words, the United States may by treaty extend its authority over matters which otherwise would be entirely in the hands of the several states.

Such a mode of procedure is in violation of the orthodox theory of state rights and for a long time it was contended that no treaty could validly be made which would interfere with the inherent rights of the states. It is now clearly established, however, that the federal government may, by making a treaty, do things which would be unconstitutional if attempted through statute law. The Supreme Court has repeatedly held that treaty provisions which regulate activities usually left to the states are valid even against state laws to the contrary. For example, each state has the inherent right to decide how land within its borders shall descend upon the death of the owner. But if the federal government has provided by treaty that property owned by an alien shall descend according to the laws of his native land, the state laws are thereby nullified as far as such property is concerned.

This question was raised squarely in the case of *Hauenstein v. Lynham*.<sup>1</sup> Hauenstein was a citizen of

<sup>1</sup> 100 U. S. 483.

Switzerland who had lived in Virginia for some time and who owned valuable real estate in the city of Richmond. When he died he left no will. He was unmarried and had no children. Under the common law of inheritance which was in force in the state of Virginia no aliens could inherit property except through a will. When the natural heirs, who were all citizens of Switzerland, claimed the property, the Virginia courts applied the Virginia law and held that the claim was illegal. The heirs then took the matter to the federal courts on the grounds that the United States and Switzerland had entered into a treaty which provided that the citizens of either country might inherit property even in those states of the United States and in those cantons of Switzerland where aliens are prohibited by local laws from inheriting or holding property. In such a case, says the treaty, the heirs shall be permitted to take the property and sell it within a reasonable time. Here was a clear conflict between a Virginia law of inheritance and the provisions of the treaty with Switzerland. Under the Virginia law the Swiss heirs had no claim. Under the treaty their claim was valid. The court stated unequivocally that the treaty provisions took precedence over the state law and this in spite of the fact that the regulation of the descent of land is one of the residual powers of the several states. Not only the descent of property, but the ownership of land, may be regulated by treaty. When the United States in its early history made a treaty with France in which French citizens were extended the privilege of owning real estate in this country, the laws of some states prohibited aliens from such ownership. Such laws did not hold and a French citizen could hold property within the boundaries of a state even though the state law forbade it.<sup>1</sup>

<sup>1</sup> *Chirac v. Chirac*, 2 Wheaton 259.

Of unusual interest is the attempt of the United States government to protect migratory birds. The right to regulate the shooting and hunting of birds is one of the residual powers of the several states. But a law protecting certain birds in one state, no matter how efficiently administered, would be largely ineffective in the case of migratory birds if the laws in other states in which the same species spent other seasons of the year were lenient or were poorly enforced. The federal government saw the need of national regulation and in 1913 Congress passed a law which prohibited the killing of migratory birds. Here was a conflict between state laws and federal laws. The lower federal courts declared the United States law unconstitutional as being outside of the delegated powers of the national government. An appeal was taken to the Supreme Court and no doubt the lower courts would have been upheld if a decision had been rendered. Before a decision was handed down a treaty was negotiated between the United States and Great Britain in which each of the contracting parties agreed to pass laws protecting birds which migrated between the United States and Canada. The treaty even went so far as to provide for specified closed seasons for certain birds. Pursuant to this treaty Congress then passed a statute which was practically the same as that passed in 1913.

When the federal game wardens began to enforce the Act there was objection from those who felt that state rights were being interfered with. The state of Missouri went so far as to ask for an injunction restraining federal officials from enforcing the law within its boundaries. Missouri contended that the birds within her jurisdiction belonged to her and that any attempt on the part of the federal government to protect them violated the Tenth Amendment, which reserves to the states all

powers not given to the United States. The federal district court refused to issue the injunction on the ground that the law of Congress was constitutional as carrying out a treaty properly made with a foreign power. The matter was then appealed to the Supreme Court, with the result that the case of *Missouri v. Holland*<sup>1</sup> now stands as a leading case on the question of the conflict between the treaty-making power of the federal government and the reserved rights of the states. The Supreme Court upheld the federal statute in every particular and restated clearly the proposition that the federal government may do through treaty-making what it cannot do through legislative action. The very same law which is invalid because it goes beyond the delegated authority of the national government may be valid when it is passed to carry out treaty provisions. In other words, the treaty-making power of the federal government is much broader than is its legislative power.

As the matter stands all anti-alien legislation found on the statute books of the states may be nullified by treaties. If California prohibits aliens who are not eligible to naturalization from owning agricultural lands, it is only because such rights have not been granted to Japanese, Chinese, and others by treaties with their respective home countries. In fact, the anti-alien land laws of California specifically state that rights guaranteed by treaty shall not be denied to any aliens. The United States has had for several years a treaty with Japan guaranteeing the right of citizens of each who may be within the jurisdiction of the other to lease land for residential and commercial purposes, but no guarantee is given of the right to own agricultural lands. If such a guarantee were included in a treaty, all anti-Japanese land laws would have to go.

<sup>1</sup> 252 U. S. 416.



Our treaty with Japan contains further guarantees to Japanese who are in this country. Among these is the right to carry on trade. The city of Seattle passed an ordinance prohibiting aliens from engaging in the business of pawnbroker. This ordinance was held to violate our treaty with Japan as far as it interfered with the rights of Japanese citizens in Seattle to engage in this particular calling.

How may this situation be harmonized with the proposition that the federal government has only delegated powers? This question is answered when we remember that the power to make treaties is one of these delegated powers. Furthermore, the Constitution itself specifically states that the supreme law of the land is made up, first, of the Constitution itself; second, of laws made in pursuance thereof; and third, of treaties made under the authority of the United States. It will be noted that laws in order to be supreme must be pursuant to the Constitution, while this term is not used in connection with treaties. At any rate, no treaty has ever been nullified by the courts on the grounds that it is outside the scope of federal authority, while federal statutes have been repeatedly so treated.

CONFLICT BETWEEN THE TREATY-MAKING POWER AND THE LEGISLATIVE POWERS OF THE HOUSE OF REPRESENTATIVES.—The Constitution places the treaty-making power in the hands of the President and two-thirds of the Senate. That is, the Senate and President together may under the treaty-making power conclude agreements with foreign countries which may establish rules and regulations which, if they take the form of legislation, can be accomplished only with the concurrence of the House of Representatives. Obviously no revenue law can be enacted without the approval of the lower House. The Constitution even provides that such laws

must originate in the House of Representatives. Nevertheless, it is within the power of the President and two-thirds of the Senate to make a treaty with the various countries with which we carry on commerce, providing for a detailed schedule of import duties, and these schedules would go into effect without the consent of the House.

As a matter of fact, no such extreme disregard of the the House has ever been exhibited, and the danger of it is small indeed. Such an independent attitude on the part of the President and Senate would make all legislation difficult, and no executive would care to go too far in ignoring the House. Furthermore, it must be remembered that no money can be appropriated except by law, which means that the House has as firm a hold on the purse strings as does the Senate. An open invasion of the legislative powers of the lower House by the Executive and Senate might easily lead to an effective retaliation on the part of the House in holding up financial legislation.

Whenever a treaty is made which requires payment of money, it is legally impossible to carry out its provisions unless the House is willing to pass the necessary appropriations. As a result, the President, in negotiating a treaty requiring an appropriation of funds, and the Senate in consenting to its ratification, are likely to note the attitude of House leaders in the matter. It is not unlikely that open hostility to such a pending treaty on the part of the House of Representatives might lead to a discontinuance of negotiations or to such alterations as might make the treaty provisions more acceptable to that body. Legally, the House of Representatives may be entirely ignored in the making of treaties, and its legislative powers may be infringed. In actual practice, however, for reasons just stated, the House is not with-

out influence, even though it be indirect, on the making of treaties.

ARE THERE ANY LIMITATIONS UPON THE TREATY-MAKING POWERS?—The treaty-making power is a very broad one indeed. It seems that any invasion of the reserved power of the states is valid and that invasion of the legislative rights of the House of Representatives is also valid. Furthermore, no treaty has ever been declared unconstitutional by the courts, and indications are that whenever the validity of a treaty is raised before the courts they will reply that if the treaty is approved by two-thirds of the Senate and promulgated by the President, the question of its scope will be classed a political matter with which the courts refuse to concern themselves.

It has been contended by some students of constitutional law that treaties may validly concern only foreign affairs, and that any attempt to use the treaty-making power to regulate purely internal affairs would be null and void. The chances are, however, that the courts would say that the decision as to where the line between foreign and domestic affairs should be drawn is political in its nature and should properly be left to the treaty-making agencies.

But suppose that the treaty-making agencies should through international agreements attempt to pass bills of attainder, or *ex post facto* laws. Or suppose that by treaties with foreign powers an export tax, which is forbidden by the Constitution, should be provided for. What would happen, in other words, if the President and two-thirds of the Senate should attempt, through the treaty-making power, to do what the federal government is specifically prohibited from doing by the Constitution? Perhaps this is only an academic question, because no treaty has so far attempted such a departure and in all

probability none will. This question has, of course, never been before the courts, but it seems reasonable to assume that any attempt to take action specifically forbidden could not be accomplished under the cloak of treaty-making. It may be safe to say that the only legal limitation on the treaty-making power is that it must not be used to do anything which the Constitution specifically forbids.

THE RELATION BETWEEN TREATIES AND FEDERAL STATUTES.—A treaty to which the United States is a party becomes a part of the law of the land as soon as it is promulgated. This is so because, as already pointed out, the Constitution specifically makes treaties a part of the supreme federal law. This is not a requirement of international law, but merely the American rule as to the place of treaties in our own legal scheme. In Great Britain, for example, no treaty is a part of British law until it is specifically made so by act of Parliament. The general rule as far as international law is concerned is that a treaty is an agreement which is binding upon the contracting governments, but does not constitute a rule of conduct for the individual citizens of the contracting countries. A treaty becomes binding on the individual citizen only when his government makes it so, and our Constitution makes all treaties binding upon the individual by placing them in the same class as the Constitution and the statutes.

Many treaties, of course, have no provisions prescribing rules of conduct for the individual. Still others may relate to individual conduct, but may not set down the rules of conduct in the treaty itself. There may be merely an agreement between the two nations to legislate for certain purposes. Such a treaty would not be self-operative and Congressional action would be necessary to make it effective. If, for example, the United

States and Great Britain should make a treaty agreeing to legislate against the manufacture of phosphorus matches, no individual conduct is affected until Congress acts. If, however, the treaty itself provides rules for the manufacture of matches so as to avoid phosphorous poisoning, these rules are in force in the United States as soon as the treaty is proclaimed. In the latter instance the treaty provisions are self-operative and automatic and need no Congressional action to make them operative.

If there is a conflict between a treaty and a statute already enacted, the treaty takes precedence. This is not because the treaty ranks above the statute, for it does not. Under our constitutional system treaties and statutes are on an absolute parity. Because of this parity, whichever instrument is of the latest date supersedes the other. Hence a treaty takes precedence over any prior conflicting statutes. By the same rule a statute passed by Congress after a treaty is promulgated supersedes the treaty provisions as far as the conduct of our home affairs is concerned.

But if a statute may nullify an earlier treaty as far as home affairs is concerned, does such nullification also bring the treaty to an end as an international agreement? It does not. As far as obligations to the other party are concerned, the treaty is in force. The only legal way in which it may be terminated is by its own provisions or by the treaty-making power—that is, the President and two-thirds of the Senate. But the conduct of domestic affairs is governed by a later statute rather than by a treaty in case the provisions of the two are in conflict.

This principle was clearly stated by the Supreme Court in the *Head-Money Cases*.<sup>1</sup> In these cases the question was raised as to the validity of a statute passed by

<sup>1</sup> 112 U. S. 580.



Congress in 1882 which levied a tax of fifty cents per head upon all aliens landing in any port within the United States. At various times previous to the passage of the law the United States had entered into treaties with many foreign countries. The treaties invariably granted the freedom of entrance of citizens of one contracting party into the territory of the other. Here was a conflict between treaties and a subsequent law. The steamship companies were particularly active in contending that the head tax was null and void because it violated treaty guarantees. This contention was not accepted by the court, which pointed out emphatically that as far as our own courts are concerned a law passed after a treaty is promulgated takes precedence over the treaty.

"In short," said the court, "we are of the opinion that so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal."

It is plain, of course, that the repeal of a treaty by Congress may involve us in serious international difficulties, and circumstances may arise under which such action might constitute a breach of faith with the other party. Suppose, for example, that we should make a treaty with Great Britain agreeing to allow automobiles and automobile parts to move without any governmental restrictions between the United States and Canada. Let us suppose further that in view of this situation a number of motor manufacturers should build factories in Canada with a view to exporting their products to the States and that the same industries in the United States, becoming aware of the keen competition which might result, succeed in influencing Congress to pass a law

levying an import tax on such products coming from Canada. Such a law would undoubtedly be upheld and enforced by our courts. But we would nevertheless be guilty of bad faith with the British government and with the Canadian manufacturers who on the basis of the treaty have made investments with the view of selling goods in the United States free from tariff restrictions. Their recourse, however, would have to be through diplomatic channels. There is nothing in our Constitution which compels us to play square with foreign countries. Whatever compulsion exists in that direction must come from any sense of fair play which we may have and from the fear of the international consequences resulting from a failure to observe international obligations. These consequences may take various forms, such as aggressive hostile action, even going so far as war, or the loss of international prestige due to a world opinion which condemns our action. At any rate, it is not the Constitution which compels us to live up to our international agreements.

When a subsequent statute nullifies a prior treaty we have then this situation. The nullified provisions are no longer, in effect, a part of our domestic law. Our administrative agents need not enforce them; in fact, they dare not; for such action would mean a violation of the subsequent statute, and our courts will not recognize such nullified provisions. At the same time the treaty stands as an international agreement and our officers are compelled, not by the Constitution, to be sure, but by international rules and usages, to recognize the treaty. In other words, the treaty is extinct as a part of our domestic law, but still remains as an international agreement. The possibilities of endless complication in case a later Congress meddles with earlier treaties are obvious. Fortunately, however, our national legislators have sel-

dom indicated any desire to repudiate our international agreements, and while their potential power in this direction is great, the danger of such meddling is very small.

WHO MAKES TREATIES?—Each independent nation determines for itself what officials or what agencies shall make international agreements. International law recognizes whatever agencies are empowered by the fundamental law of each country to act as official treaty-makers. The American Constitution provides in Section 2 of Article X that the President “shall have power by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur.”

Very early in our history the question arose as to whether the Senate should, either as a body or through its direct representatives, participate in the preliminary negotiations which naturally precede the presentation of a treaty in final form. In other words, does the phrase “to make treaties” include all the steps and must the Senate be consulted at every step, or does it meet the requirements of the Constitution if the President, either personally or through his representatives, goes ahead with the negotiations and brings to the Senate for approval, or rejection, the treaty in its final form only? Such a question would not be decided by the courts, as it would be immediately declared a political one. Hence any conflict between the President and the Senate must be settled by those two agencies between themselves. In spite of continued and vigorous protests on the part of the Senate, it has become the usual practice for the President to conduct the negotiations and ask the advice and consent of the Senate only as to the treaty in its finished form. The President may—and sometimes he does—consult with Senate leaders during the period of negotiation and may even appoint members of the

Senate to sit around the conference table and to participate in drafting the treaty.

Regardless of whether the Senate should be consulted during the negotiations, it is perfectly clear that its approval by a two-thirds vote must be given before a treaty may go into effect. The approval must be given to the proposed treaty exactly as it stands. No amendments are binding on the other party unless it wishes to put the President, as well as those representing the other party, to the trouble of making changes that are acceptable to both. Nevertheless, it has happened in a few instances that the Senate has insisted on making reservations. In a sense, such action might be called a part of the negotiations. Any reservations, however, which are made at the time of approval are not binding as a part of the treaty unless accepted by the other party or parties.

A treaty takes effect when the President exchanges notice of ratification with the other parties. The President need not put a treaty into effect even after it is approved by the Senate. Unexpected international developments may make it unwise to do so. Hence the President's power over treaty-making is indeed great. The initiation as well as the final step is in his hands. He decides the time at which a treaty becomes operative.

WHO HAS THE POWER TO TERMINATE TREATIES?—One treaty may be terminated by making another one. Sometimes a treaty contains provisions for the term for which it is to be in force. In such cases a treaty is terminated automatically. A treaty may be abrogated by denunciation by the President and the Senate and in some cases a denunciation of a treaty by the President alone terminates it. Such action, of course, implies that it is done without the approval of the foreign power involved and may involve us in international complica-

tions, but so far as our domestic law goes the treaty ceases to operate when the President, either alone or with the Senate, declares that it is abrogated.

When war is declared most treaties become inoperative as between the belligerent countries. Some are revived when the war is over, while others are not. A further discussion of this point hardly belongs in the field of constitutional law, as it is not based on any of the provisions of the American Constitution.

EXECUTIVE AGREEMENTS.—There are many international agreements, especially those of minor importance which are not dignified by the name "treaties." The President may enter into understandings and agreements, more or less informal, with representatives of other countries which bind us as far as national honor is concerned, even though they are not treaties. Such agreements, of course, are not a part of our domestic law, as they would be if they were full-fledged treaties.

Oftentimes an executive agreement is a preliminary step to a treaty.

Summarizing our discussion of the treaty-making power, we may say, first, that a treaty may constitutionally infringe on the reserve power of the state and frequently does so; second, that it may also infringe on the legislative power of the House of Representatives, but seldom does so; third, in our domestic law a treaty is on a par with congressional statutes and in case of conflict the instrument of latest date holds over all prior statutes or treaties; fourth, that the nullification of a treaty by a subsequent statute does not abrogate the treaty as an international agreement, but merely as a part of our domestic law; and fifth, that the President is the central figure in treaty-making, with his power to initiate the proceedings, as well as to determine the time at which the instrument becomes operative. The



Senate's power is virtually limited to accepting the treaty by a two-thirds vote or rejecting it by one more than one-third of those present.

**EXTRADITION OF CRIMINALS.**—In accord with the fundamental principle that the federal government and not the states has power over foreign relations, the whole matter of demanding the return from a foreign country of a fugitive from justice, alleged to have violated a state or a federal statute, is handled by the federal government. Hence if a person accused of crime in Vermont is apprehended only a few miles away in Montreal and refuses to cross the boundary into the United States, the Vermont authorities are powerless unless the federal government asks for his extradition. According to the same principle, no state has the power to give up a fugitive from justice from a foreign country. This, too, is a federal matter. Hence a fugitive from Canada apprehended in Vermont cannot be taken out of the United States merely by the consent of the state authorities. The extradition must be approved by the President of the United States.

An interesting question is whether the President has the power to give up fugitives demanded by other countries unless he is authorized to do so by a treaty or by an Act of Congress. It has been the practice of our Presidents to refuse to surrender fugitives except when they have been empowered to do so by treaty or statute. This is probably the correct constitutional interpretation because the President has no inherent powers. His powers are all the result of specific grants plus the implied power which goes with express grants of power. There is nothing in the rules of international law to compel any country to give up fugitives from another country unless there is a treaty agreeing to such extradition. In the absence of extradition treaties, fugitives

are often surrendered as a matter of comity, or international courtesy. Thus, in the absence of treaties with Great Britain on the subject, Congress would no doubt empower the President to return fugitives from Canada upon the request of the Canadian government. As a matter of fact, however, we have extradition treaties with practically every country in the world prescribing the mode of extradition and naming the crimes for which fugitives are extraditable.

When a person is brought into the jurisdiction of the United States through extradition proceedings he cannot be tried except for the crime for which he was extradited. Suppose that a person who is alleged to have committed burglary and murder in Ohio and escapes to Canada and is extradited as being charged with burglary. Ohio can try him for burglary, but not for murder, as the latter crime was not mentioned in the extradition papers. After a man has been tried, convicted, and punished, or tried and acquitted, he must be given his complete freedom so that if he wishes he may leave the country. Of course, if he remains after he is freed, he may, within a reasonable time, be tried for other crimes than the one for which he was extradited. A person who has been extradited may, of course, be tried for any crime which he commits after he has been brought in by extradition proceedings.

**WAR POWERS. DECLARATION OF WAR.**—The federal government has the exclusive power to declare war. The only circumstance under which a state may engage in war is when “actually invaded or in such imminent danger as will not admit of delay.” On the other hand, Congress is given the power “to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and sea.” It should be noted that it is Congress and not the President which is given the

power to declare war. The framers of the Constitution evidently sensed the danger which linked the centralization of complete power to declare war in the hands of the Executive and wisely placed the power in the hands of the representatives of the people. To-day public sentiment is perhaps stronger than ever against giving the Executive the power to declare war. There is a growing feeling that the world will be more secure if war cannot be brought about without the consent of the general public. As it is probably impracticable to submit the question of war to a referendum, the next best thing is to leave such a decision in the hands of the governmental agency most nearly representative of public opinion—namely, Congress. For this reason it is manifestly unfair to criticize those members of Congress who refuse to declare war at the request of the President. If a request for a war declaration by the President leaves our national legislature no discretion, if under such circumstances they are to “stand by the President” regardless of their respective personal opinions and regardless of public opinion in their respective constituencies, the net result is that the President alone has in effect the power to declare war. Nevertheless, the President can bring about an international situation which makes it difficult for Congress to do otherwise than to declare war.

In one instance the United States entered into war without a congressional declaration. This was in the case of the Civil War when President Lincoln issued a proclamation declaring that a state of war existed. The court recognized this proclamation as a legal basis for a state of war. The situation was a peculiar one because it was merely the recognition of a domestic situation. Such a proclamation would probably have no effect in the case of an international dispute unless it was followed by a resolution of Congress recognizing a state

of war. If in an international crisis the President and Congress should take opposite views the situation would be serious, but this is a risk which must be taken. No matter what form of governmental agencies are intrusted with the war power, there are certain risks, and it is safer to take chances on differences of opinion between the Chief Executive and Congress than to give the President complete authority to declare war.

The President as commander-in-chief has complete authority over invaded territory. When hostilities cease, the control of any territory acquired as a result of the war is governed through the executive offices until Congress provides for some other method of administering such areas.

**CONTROL OVER ARMED FORCES.**—The President is commander-in-chief of all the armed forces, military and naval. But he has no authority to raise an army or navy except by the authority of Congress. When war is declared the President may command whatever military forces already exist, but he can do nothing without congressional authorization in the matter of adding to those forces. When we entered the World War, President Wilson asked for volunteer enlistments to bring the regular army to its full strength. He also had control over the organized militia companies, which by previous Act of Congress had been federalized. Enlistments to bring the navy to the size prescribed by law were also asked for. Outside of these things, however, the President had to wait until Congress passed a law authorizing the raising and equipping of a larger force.

There never has been any question as to the power of Congress to raise an army, but up to the time of the World War it had not been decided by the Supreme Court whether conscription is a constitutional method of raising military forces.

Outside of the drafts used during the Civil War it had always been the policy to use voluntary enlistments for getting soldiers to serve in the armed forces of the United States. Strange to say, the constitutionality of the draft laws of the Civil War was never questioned before the federal courts. This was, no doubt, due to a large degree to the tense and abnormal war atmosphere which makes it seem almost treasonable to question such a law during an emergency.

When, in 1917, Congress passed a comprehensive draft law, its constitutionality was promptly questioned. The Supreme Court in the Selective Draft Cases<sup>1</sup> unanimously upheld the law. The express power to declare war and to raise and support armies clearly implied, said the court, the right to compel individuals to serve. With this decision all doubt as to the power of Congress to draft men for military service vanishes. This does not settle the question of whether conscription is wise, or democratic, or conducive to world progress, but it does settle the question of its constitutionality.

Besides raising the army it must be equipped and financed. These matters also are in the hands of Congress. With all his power as commander-in-chief the President has no legal means of paying for military expenditures except through a congressional appropriation. No better illustration of the check and balance system can be found. The President has the power of the sword, while Congress has the power of the purse, and unless the purse strings are unloosed the power of the sword is very small indeed. If the President, facing a hostile Congress, should lack funds to buy food and equipment for the army, he might conceivably order the army to confiscate food supplies and to take over factories and run them so as to produce the necessary

<sup>1</sup> 245 U. S. 366.



equipment. He might even order his soldiers to take forcibly the funds in the United States Treasury. But in doing all of these things he would not be acting as President of the United States, but as a military dictator, and his acts would be unconstitutional.

As to movements of the army and navy, the President is in complete command. A law passed by Congress directing movement of troops would greatly embarrass the President. To ignore such a law is within his constitutional power. He may issue orders wholly contrary to the wishes of Congress. Nevertheless, to go counter to the wishes of the body which must vote money to pay the bills of the campaign might be highly unwise. As a matter of fact, no important military program either in war or in peace can succeed unless the President and Congress are both in sympathy with it. This is especially true in time of war. At such a time friction between the executive and legislative departments would be most serious. Past experience, however, indicates that in time of emergency the highest degree of coöperation between the President and Congress is likely to prevail. Thus, in the Civil War, Lincoln generally received the support of Congress, as did Wilson during the World War.

**FEDERAL AUTHORITY OVER THE MILITIA.**—The militia is made up of two parts—first, the organized militia usually called the National Guard consisting of volunteers who spend only a small portion of their time in drill and in encampment; and, second, the unorganized militia, made up of all the able-bodied men of fighting age. The usual age limits are between twenty-one and forty-five, but Congress may go beyond these limits in either direction in requiring military service.

Congress is given the express power to provide for calling forth the militia "to execute the laws of the

Union, suppress insurrections, and repel invasions." Beside the express grant there is the implied power to call forth the militia in time of war, possibly even to the extent of sending them on a foreign expedition. Congress very early in our history gave the President the power to call out the organized militia into the service of the United States. Without such authorization the President cannot call the state militia into the federal service.

The Constitution further gives Congress the authority, in Section 8 of Article I, "to provide for organizing, arming, and disciplining the militia," even when it remains under state control. The same clause reserves to the states the right to appoint militia officers "and the authority of training the militia according to the discipline prescribed by Congress."

The organized militia, then, in time of war, is almost entirely under the authority of the federal government. Even in time of peace, about the only power left entirely in the hands of the state is the appointment of the officers and the use of the militia locally to maintain law and order.

**IMPLIED POWERS IN TIME OF WAR.**—The express powers given to Congress "to declare war" "to raise and support armies," and "to provide and maintain a navy" carry with them the widest possible implications. Judging from the lengths to which the federal government went during the World War in encroaching on the reserve power of the states, it would seem as though state rights were well-nigh forgotten for the time being. When war is declared, Congress has the implied power to take any action which is necessary or desirable for successfully prosecuting the war. About the only limits on the power of the federal government are the express constitutional prohibitions upon it. While the reserved

powers of the states may be ignored in a way which would make a Jefferson or a Calhoun gasp, it is likely that the courts would nullify laws which violate specific prohibitions. An *ex post facto* law, the abolition of the jury system in federal trials, the levy of an export tax or any other thing clearly forbidden by the Constitution, would no doubt be declared null and void even though Congress should claim that such extreme action were necessitated by the war emergency.

During the World War the police power of the state was subordinated time and again to the authority of the federal government in ways which would have been unconstitutional in times of peace. The railroads were taken over by the national authorities and operated in such a way as virtually to rob the states of the right to control intrastate commerce. The control of telephone lines was to a large degree made a federal matter. Under its implied war power Congress before the passage of the Eighteenth Amendment, prohibited the sale of liquor. A picturesque though less important illustration of the wide sweep of federal power was the proclamation of the President, by authority of Congress, closing the professional baseball season at an early date. Much of the legislation under the implied war power was not questioned, but judging from the cases that did reach the courts, it is clear that these powers are most sweeping.

CONSTITUTIONAL GUARANTEES IN TIME OF WAR.—In theory at least all constitutional guarantees stand as firmly in time of war as in time of peace. Thus in case of *United States v. Cohen Grocery Co.*<sup>1</sup> it was held that the Food Control Act violated the due process clause in providing for punishment for profiteering because it

<sup>1</sup> 255 U. S. 81.

did not set up a clear standard for determining when a person was guilty.

On the other hand, laws regulating the freedom of speech and of the press, which were considered altogether too severe by many constitutional lawyers, were upheld. The Espionage Acts have been severely condemned, but the Supreme Court ruled that they did not violate the constitutional guarantee of the First Amendment. In some cases those alleged to have violated the law were guilty of statements where the possible effects upon the war program were only remote and indirect. The suppression of speech and of the press was carried much farther during the World War than ever before in our history. Apparently the power to muzzle the expression of opinion during time of war is very great—much greater, in fact, than many liberal Americans think it should be.

**FOREIGN COMMERCE.**—Through its power over foreign commerce Congress may greatly influence our relations with other countries. The power seems to be almost unlimited as far as constitutional limitations are concerned. The importation or exportation of commodities may be forbidden entirely or it may be permitted under such conditions as Congress may impose, except that no export tax may be levied. Foreign vessels may be prohibited from entering our ports, and if admitted may be compelled to meet such conditions as Congress may prescribe. It must be borne in mind, however, that all of these things are also subject to treaty regulations and any arbitrary or discriminatory legislation regulating foreign commerce may involve us in international difficulties even though such legislation may be valid as far as the American courts are concerned.

Under its authority to regulate foreign commerce

Congress has complete control over immigration and may exclude any aliens whom it wishes to keep out. Congress also has the power to make laws which apply to American vessels on the high seas and may provide for the punishment of piracy or other offenses against the rules and practices of international law.

CONSTITUTIONAL LAW AND INTERNATIONAL LAW.—The most important connecting link between these two is the provision that all treaties are, by the Constitution, specifically made a part of the law of the land. This applies not only to treaties with one foreign nation, but also to any treaties to which there are several contracting parties. Thus, if the President and Senate should by treaty enter the League of Nations accepting all the rules and regulations pertaining thereto, all such provisions would become a part of our legal system and be so recognized by the courts. In the absence of treaty regulations covering them the courts refuse to take jurisdiction over any cases arising between the United States and foreign countries, insisting that such questions are political in their nature. When it comes to cases between American citizens and citizens or subjects of foreign countries, the courts have jurisdiction and try to follow such principles of private international law as seem applicable. Private international law is one of the most complicated of all the fields of law and is sometimes called the conflict of laws. As far as there are any generally accepted rules and usages governing international relations, such rules and usages are generally accepted by our courts except when they are contrary to our Constitution, laws, or treaties. The Supreme Court has gone so far as to say that "international law is a part of our law," and that "where there is no treaty, and no controlling executive or legislative



Acts or judicial decision, resort must be had to the customs and usages of civilized nations.”<sup>1</sup>

Because of the precedence which our courts give to Acts of Congress passed subsequent to treaty, it is always possible for Congress to interfere materially with the administration of foreign affairs. As more and more international machinery develops and as the relationship between the countries of the globe become more intimate it may in time become desirable, if not necessary, in the interests of better world coöperation, to make it unconstitutional for Congress virtually to nullify a treaty by later unfriendly legislation. Such a curtailment of the power of Congress would mean a surrender of a portion of our sovereignty, and at present, at least, such a surrender would be entirely unacceptable to the mass of Americans. It should be remembered, however, that a surrender on our part would in all likelihood also mean a corresponding surrender on the part of other countries. Some of the most far-seeing students of world affairs are convinced that it is only by a mutual surrender of portions of sovereignty that effective and permanent world coöperation can be attained.

<sup>1</sup>The “Paquette Habana,” 175 U. S. 677.



## APPENDIX



# CONSTITUTION OF THE UNITED STATES OF AMERICA

We the people of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

## Article I

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five,



New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section 4. The Times, Places and Manner of holding Elections

for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing

for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces:

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Pro-

portion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, or ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

## Article II

Section 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four years, and, together with the Vice President, chosen for the same Term, be elected, as follows



Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and

Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between

them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

### Article III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. Treason against the United States, shall consist only

in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

#### Article IV

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legisla-

ture, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

#### Article V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

#### Article VI

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

#### Article VII

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.



AMENDMENTS TO THE CONSTITUTION <sup>1</sup>

## Amendment 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

## Amendment 2

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

## Amendment 3

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

## Amendment 4

The rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of

<sup>1</sup> Amendments 1 to 10 were in force December 15, 1791.

life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

#### Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

#### Amendment 7

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

#### Amendment 8

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

#### Amendment 9

The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

#### Amendment 10

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

#### Amendment 11

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted

against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

*In force January 8th, 1798*

#### Amendment 12

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

*In force September 25th, 1804*

## Amendment 13

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

*In force December 18th, 1865*

## Amendment 14

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis or representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid

or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

*In force July 28th, 1868*

#### Amendment 15

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

*In force March 30th, 1870*

#### Amendment 16

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

*In force February 25th, 1913*

#### Amendment 17

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary



appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

*In force May 31st, 1913*

#### Amendment 18

Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Sec. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Sec. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

*Declared adopted January 29th, 1919. Went into effect  
January 29th, 1920*

#### Amendment 19

The right of the citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

*In force August 26th, 1920*



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